IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978
No. 78-1106

DR. HARRY W. THERIAULT,

Petitioner,

-against-

FREDERICK SILBER, Director, United States Chaplain Service, et al.,

Respondents.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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January 12, 1979.

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The petitioner, Dr. Harry (Shiloh) Theriault respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit entered on August 16, 1978.

## OPINIONS BELOW

The order and opinion of the Court of Appeals, entered on August 16, 1978, is reported at 579 F.2d 302 (1978), (A-1). The original order and opinion of the same Court, entered on May 16, 1978, is reported at 574 F.2d 197, (A-6). The opinion of the District Court of the United States for the Western District of Texas is unreported (A-8).

## JURISDICTION

The order of the Court of Appeals for the Fifth Circuit was entered on August 16, 1978. An order extending the time to file a petition for a writ of certiorari was granted by Justice Pawitt of this Court on November 13, 1978, exending the time for filing a petition to and including January 13, 1979 (A-38). This petition for certiorari was filed in that time frame. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

## QUESTIONS PRESENTED

When the leader of a church has struggled both in courts and prisons to permit the believers to exercise their religious rights but is frustrated by a District Court decision:



(1) May the Court of Appeals dismiss a proper and timely appeal on jurisdictional grounds just because the Notice of Appeal, filed by a prisoner pro se, contains references to the trial judge which could be characterized as insulting?

(2) Can the findings of the District Court that "The Church of New Songs" is not a religion be sustained in light of the standards set forth by this Court, the nature of the church activities and previous decisions regarding this church?

(3) Was the District Court's denial of all of petitioner's claims for relief and all exercise of religious freedom justified under the First and Fourteenth Amendment's commandments of religious freedom?

## CONSTITUTIONAL PROVISIONS

United States Constitution
First Amendment:

> Congress shall make no Law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom

of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.



Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

Federal Statute

18 USC 401. Power of court

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as -

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transaction;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701.



Federal Rules of Appellate Procedure

Rule 3. Appeal as of Right - How Taken

(a) Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 USC § 1292(b) and appeals by allowance in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6, respectively.

***

(c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

Federal Rules of Civil Procedure 41:

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(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer



evidence in the event the motion is not warranted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown to right relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

## STATEMENT OF FACTS

This case originated from charges brought by the petitioner, a prison inmate and a co-founder of a religious group known as "Church of the New Song," against federal prison authorities for deprivation of the constitutional rights to practice the rites of the religion.

The United States District Court entered a judgment against the petitioner on February 10, 1978, finding that: 1) the Church of the New Song is not a religion; and, 2) assuming that the church is a religion, the restrictions imposed on the petitioner's right to practice his religion are justified as necessary prison disciplinary measures. A timely notice of appeal was filed by the petitioner. The appellee moved to strike appellant's notice of appeal on the ground that it contained a vile and insulting reference to the trial judge.* The Court of Appeals

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*First notice of appeal - the objectionable language: "lying... opinion...hatefully and unamericanly entered by the Dishonorable Judge." (A-1)



struck appellant's notice of appeal and gave appellant ten days in which to file a proper notice of appeal. The appellant then filed a second notice of appeal but repeated some of the language.* Thereupon the Court of Appeals dismissed the appeal with prejudice.

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*Second notice of appeal - the objectionable language reads:

> ...lied pointblankly... lying judge, who has no right to lie...lying decision...pointblank lies.
>
> Today is May 23, 1978 and plaintiff requests that this court not lie too.

[The decision of the Court of Appeals does not refer to this last sentence so it cannot be construed as a basis of its decision although the request may be considered less than flattering.] (A-2)

## Reasons for Granting the Writ

### POINT I.

### THE COURT OF APPEALS' DISMISSAL OF PRISONER'S PRO SE APPEAL MERELY BECAUSE THE NOTICE OF APPEAL CONTAINED REFERENCE TO THE TRIAL JUDGE AS LYING CONSTITUTES AN UNCONSTITUTIONAL AND UNLAWFUL DENIAL OF JUSTICE.

There are three conceivable sources of the Court's authority to dismiss the appeal by petitioner: 1) Federal Rules of Appellate Procedure, Rule 3, which provides for dismissal of the appeal for untimely or improperly filed notice of appeal; 2) the Court's inherent power to enforce compliance with its orders, 3) the Court's power to punish for contempt:

#### Dismissal for Untimely or Improperly Filed Notice of Appeal

In recent years federal courts have followed a liberal practice with respect to pro se litigants, recognizing the difficulties inherent in proceeding without counsel while incarcerated.



incarcerated. Evidencing this practice are the many cases in which technically inadequate papers filed pro se have been held the equivalent of a proper notice of appeal.* The

*Illustrative decisions are: Fallen v. United States, 378 US 139, (notice of appeal by a prisoner in the form of a letter delivered, well within the time fixed for appeal, to prison authorities for mailing to the clerk of the district court held timely filed notwithstanding that it was received by the clerk after expiration of the time for appeal; the appellant "did all he could" to effect timely filing); Richey v. Wilkins, 335 F.2d 1 (2d Cir. 1964) (notice filed in the court of appeals by a prisoner without assistance of counsel held sufficient); Halfen v. United States, 324 F.2d 52 (10th Cir. 1963) (notice mailed to district judge in time to have been received by him in normal course held sufficient); Riffle v. United States, 299 F.2d 802 (5th Cir. 1962) (letter of prisoner to judge of court of appeals held sufficient). Earlier cases evidencing "a liberal view of papers filed by indigent and incarcerated defendants" are listed in Coppedge v. United States, 369 US 438, 442, n.5, 82 S.Ct. 917, 8 L.Ed.2d-21 (1962).

rationale underlying these decisions was well expressed by the Court of Appeals for the Fourth Circuit in Gunther v. E.I. DuPont de Nemours & Co., 255 F.2d 710, 717 (1958):

> The purpose of the notice [of appeal] is to acquaint the appellee and the appellate court with the fact that an appeal has been taken from a particular case. When it appears that adequate information is given by the notice, the appeal should not be dismissed for mistakes which do not mislead or prejudice the appell. [citations omitted]

In the present case, respondents do not claim that they were misled or prejudiced by petitioner's notice of appeal. Petitioner's notice contained all the requisite information, was substantially correct in form, and clearly evidenced his intent to appeal. Frustrated litigants get excited and often use unwarranted words and phrases no member of the bar would or should. What may be a reversible error is called a "lie" by that frustrated pro se litigant. Yet this was the only defect causing dismissal - a defect irrelevant to the purpose of a Notice of Appeal.



Petitioner's use of the word lies is based on at least four different factors: the judicial rhetoric with which he and his religion were treated was less than polite, i.e., "unmistakable stench of the skunk"; (A-32) the fact that while this case was on remand by the Court of Appeals to "ventilate" the issues the District Court both criticized that remand for that purpose (A-9) and reaffirmed all previous findings of facts (A-30), years of frustration with the judicial system (see cases cited at fn. 7, Theriault v. Silber, (A-3) including the reversal of a finding of contempt against two wardens' refusal to follow an order permitting a "trial run" of his religion, (A-12); and a transfer to another out-of-jurisdiction prison after that order; the belief that many of the District Court's statements are lies.

If "a paper will not be deemed inadequate as a notice of appeal because of unformality in its form or title," Fitzsimmons v. Yaeger, 391 F.2d 849, 853 (3rd Cir. 1968), a paper should not be deemed inadequate because of unformality in its wording. The severity of the penalty imposed here - loss of an intended appeal on the merits - far exceeds the gravity of any wrong committed, particularly

given the importance of the constitutional right and context of high emotions. In the absence of any finding that the notice of appeal was otherwise improper, untimely, or that it misled or prejudiced the appellee, the Court's dismissal of the appeal cannot be justified under Fed. R. App. P., Rule 3.

Dismissal as an Exercise of the Court's Inherent Power to Compel Compliance with its Orders.

It has been recognized that dismissal with prejudice may be imposed for disobedience of an order of the Court. This power is inherent in the Court, as well as being recognized in the federal procedural rules.* Fed. R.

*See: Fed.R.Civ.P., Rules 41(b) 78 and 83, 28 USCA; Link v. Wabash Railroad Co., 370 US 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962), holding that involuntary dismissal may be entered sua sponte as a result of the inherent power of the Court, and is not limited by Rule 41(b) to cases in which the opposing party moves for dismissal; First Iowa Hydro-Electric Co-op. v. Iowa Illinois Gas & Elec. Co., 245 F.2d 613 (8 Cir. 1957) cert. den.



Footnote cont'd

355 US 871, 78 S.Ct. 122, 2 L.Ed. 2d 761, dismissal for failure to give security and testimony on depositions as ordered; O'Brien v. Sinatra, 315 F.2d 637, pp. 641, 642 (9 Cir. 1963), dismissal for failure to comply with Court's order to file amended complaint; Agnew v. Moody, 330 F.2d 868 (9 Cir. 1964), noncompliance with order to replead to comply with Rule 8(a), Fed.R.Civ.P. Cf. Societe Internationale, etc. v. Rogers, 357 US 197, 78 S.Ct. 1087, 2 L.Ed. 1255 (1958); Vol. 35B, C.J.S. Federal Civil Procedure §798, p. 73.

Civ. P., Rule 37(b) provides for dismissal of an action for refusal to make discovery, and 41(b) is concerned with involuntary dismissal for failure to prosecute or to comply with rules or any order of Court during trials.

Dismissal of action with prejudice is the harshest judicial sanction. Such measures are used only in extreme circumstances, generally as a means of compelling the production of evidence which is indispensable in deciding the merits of the case. When a litigant's refusal to make discovery or to participate in good faith in the trial process forestalls a just determination of the issues on their merits, dismissal with prejudice is justified on the presumption that he has waived his right to present additional evidence. (Hammond Packing Co. v. Arkansas, 212 US 322, 29 S.Ct. 370 53 L.Ed. 530, 15 Ann. Cas. 645 (1909); See also Dallas Cabana Inc. v. Collier, 469 F.2d 606, (5th Cir., 1972). This power to create a presumption of fact is distinguished from the power to punish for contempt (Hammond Packing Co. v. Arkansas, supra). This Court has held that dismissal used the mere purpose of punishing for contempt is a violation of Due Process.



Hovey v. Elliott, 167 US 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897).

In the present case, the petitioner's refusal to eliminate an "insulting" remark from the notice of appeal did not in any way forestall the Court's ability to determine on the merits of the case, and no presumption of waiver of defense can be inferred from petitioner's refusal. The Court's dismissal of the appeal was not intended as a measure to compel the production of evidence, and hence could not be justified as an exercise of its inherent power to compel compliance with court orders. The Court's action, therefore, can only be interpreted as a form of mere punishment for contempt.

The Court's Power to Punish for Contempt

The Court's power to punish for contempt of its authority is delineated by legislation under 18 USC § 401 and § 402 which provide that a Court of the United States shall have power to punish by fine or imprisonment, or both, any act of contempt prescribed by statutes. It is a legislative declaration that the power of punishing for contempt shall not exceed beyond its known and acknowledged limits of fine and

imprisonment Anderson v. Dunn, 5 US 204, 6 Wheat 204, 5 L.Ed. 242 (1821).

In Hovey v. Elliott, supra, it was held that a Court did not have the right to strike from the files the answer of a defendant summoned in contempt and to condemn him without a hearing on the theory that he had been guilty of a contempt. The Court held that the power of the Court to deny a favor to a person in contempt does not include the power to refuse to a person in contempt the right to defend in the principal case on the merits.

The United States Court of Appeals of the Fifth Circuit, the same Court that dismissed the appeal of this petitioner for contempt, held in Deauville Associates, Inc. v. Eristavi-Tchilcherine et al. 173 F.2d 745, 746, (5th Cir., 1949) that

> A litigant may be punished for contempt by fine or imprisonment, or both, Sec. 387, Title 28 USCA [now 18 USCA § 402]; but the court should not prescribe, as a means by which he should purge himself of such contempt that its doors be closed to him in the defense of either his liberty or his property.



Due process of law signifies a right to be heard in one's defense. These decisions establish that these are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. Denial of a litigant's right to defend "as a mere punishment" is a clear violation of the Fifth Amendment of the Constitution. (Societe Internationale, etc. v. Rogers, 357 US 197, 78 S.Ct. 1087, 2 L.Ed. 1255 (1958)

This case has raised important questions as to the limitation of Circuit Courts's power in light of the Fifth and Fourteenth Amendments, and warrants granting of certiorari. Petitioner respectfully prays that he receives the relief he seeks.

## POINT II

## THE DISTRICT COURT APPLIED INCORRECT STANDARDS IN FINDING THAT THE CHURCH OF NEW SONG WAS NOT A RELIGION.

The threshold determination to be made in this case concerns whether or not the Church of New Song is a "religion" so as to come under the protection of the First Amendment. The term "religion" is not defined in the Constitution. A succinct and comprehensive definition of that concept has been held "a judicial impossibility" by the District Courts in Theriault v. Carlson (Theriault I) 339 F.Supp. 375, 382 (N.D. Ga., 1972) (A-39) and Remmers v. Brewer 361 Supp. 537, 540 (S.D. Iowa, when confronted with the question about the legitimacy of the Church of New Song as a religion. The following principles, however, can be elicited from a few cases that this Court has issued as guidelines in this area.

1) The validity of what a person believes cannot be questioned. It is not the function of the government or of the Court to consider the merits or fallacies of a religion, however fanatical or preposterous it may be.



(United States v. Ballard, 322 US 78, 64 S.Ct. 882, 88 L.Ed. 1148, 1944; see also: Fullwood v. Clemmer, 206 F.Supp. 370, 343 (DC DC, 1962); (see also the recent case Universal Life Church, Inc. v. United States, p. 11, unreported decision by the District Court for the Eastern District of California, 1974. See in general Weiss, "Privilege, Posture, and Protection, 'Religion' in the Law" 73 Yale 593, 1964).

2) "Religion" has been construed by this Court as a belief "in a relation to a Supreme Being" to embrace all religions and to exclude essentially political, sociological, or philosophical views. (United States v. Seeger, 380 US 163, 85 S.Ct. 850, 1965)

3) One test of whether a creed is a "religion" is whether a given belief occupies a place in the life of its possessor parallel to that filled by an orthodox religionist.

(United States v. Seeger, supra)

Applying these standards, the District Courts in both Theriault v. Carlson and Remmers v. Brewer, supra, found that the Church of New Song is a religion. The decision of the District Court in Remmers v. Brewer was affirmed by the Court of Appeals in Iowa 494 F.2d 1277 (8th Cir., 1974) certiorari denied 419 US 1012, 95 S.Ct. 332, 42 L.Ed. 2d 286) (1974). Theriault v. Carlson, however, was subsequently vacated and remanded, 495 F.2d 390, 395 (5 Cir. 1974), rehearing denied, 498 F.2d 1402 (5th Cir., 1974) cert. denied sub nom.

The present case was commenced in 1972. The District Court at El Paso, in denying the Church of New Song as a religion, made the following findings:

> (1) Theriault does not simply allege to hold a concept of Supreme Being of Deity nor the vaguer concepts of reality or God as outlined by Hinduism and Buddhism, but rather claims to be Jesus Christ." (A-17)



The petitioner contends that 1) the District Court's finding was based on a misinterpretation of the writings of the church; and 2) assuming that the petitioner did claim to be Jesus Christ, this claim could not be the basis for denying the validity of the Church of New Song as a religion as inquiries about the existence of a religion's "Supreme Being" or the truth of its concepts are foreclosed to government (United States v. Ballard, supra(the Ballards claimed immortality and other divine characteristics) and United States v. Seeger, supra). Many religious leaders have and do claim all or part of divinity from Christ through Mohammed through Joseph Smith to Daddy Grace, etc., and their religions are properly granted constitutional protection.

> (2) The District Court made another finding, on a subjective judgment based upon misinterpretations of the petitioner's teachings, that,
>
> > It should be noted that in the conscientious objector cases the beliefs held by the petitioners were in opposition to violence and war in contrast to the violence and destructiveness

of plaintiff in this case. (A-18)

The petitioner contends: 1) the Court's characterization of petitioner or his beliefs was totally unfounded. It has been established that the basic teaching of the Church of New Song is that Eclat, the supreme force or spirit, is a unifying and harmonizing spirit which unites all men in brotherhood.* It has been amply supported

*The petitioner does not wish to burden the court at this point with the literature of the Church of the New Song. However, if certiorari is granted, and if the court so desires, this literature will be supplied from pamphlets to the major treatises for the religion is deep in dogma and doctrine.



by testimonies throughout the trial that the Church of New Song has had rehabilitative effects on prison inmates and on people in general; 2) assuming that the petitioner was not totally passive, which is understandable in view of the nature of the prisons and the suppression imposed on the petitioner and his believers, violence and destructiveness, if proven, are only grounds for imposing specific restrictions on the forms of religious exercises. Churches, unfortunately, are often as familiar with swords as they are with devotional song. Did the crusades make the Catholic Church not religious? The validity of a religion cannot be denied on the basis that it is characterized as liable to invoke violence (like a 100 year war?). Such an interpretation might lead to the conclusion that completely passifistic religions of the conscientious objectors are the only valid religions if in fact no violence from their profession ensues.

(3) the District Court also stated:

> The professed belief of Mr. Theriault that he is the second Messiah.... appears to this Court to be insincere and, like the rest of the action of the petitioner, are essentially political, sociological and philosophical. (cf. the claims of the Ballards, US v. Ballard, supra; Weiss, op. cit.)

Hence, the Court had succeeded in enmeshing the three district and separate elements in religion, namely, the "truth" of the belief, the sincerity of its believers, and the religious nature of their belief. The Court's rationale seems to be that a person who claims to believe in what the judge finds unacceptable is insincere in his belief and therefore his belief is not religious in nature. This is a gross misinterpretation of the holdings of this Court in Ballard and Seeger, and is diametrically opposed to the basic philosophy of the First Amendment.

This case presents squarely to the Court the issue of what constitutes a



religion, particularly as it relates to a newly organized religion. In view of the importance of the issue of the lower courts, a certiorari should be granted.

## POINT III.

### THE DISTRICT COURT'S DENIAL OF A REASONABLE OPPORTUNITY FOR PETITONER TO EXERCISE HIS FAITH COMPARABLE TO THE OPPORTUNITY AFFORDED FELLOW PRISONERS OF OTHER RELIGIONS VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS.

If the Church of the New Song is recognized as a religion, the remaining issue is whether the petitioner is entitled to enjoy the degree of religious freedom granted prisoners of other faiths.

In Cruz v. Beto, (405 US 319, 31 L.Ed. 2d 263, 92 S.Ct. 1079, 1972) a complaint by a state prisoner alleged that:

> ...while prisoners of other religious sects were allowed to use the prison chapel, the plaintiff and other Buddhist prisoners were not; that upon sharing Buddhist religious material with other prisoners, the plaintiff was put in solitary confinement; that the plaintiff was prohibited from corresponding with his



> religious advisor; that chaplains of the Catholic Jewish, and Protestant faiths, as well as copies of the Jewish and Christian Bibles, were provided at state expense; that weekly Sunday school classes and services were held for such sects; and that merit points, enhancing eligibility for desirable job assignments and early parole, were given prisoners as a reward for attending orthodox religious services. The District Court granted the defendant's motion to dismiss, concluding that the complaint concerned an area that should be left to the sound discretion of prison administration (329 F.Supp. 443), and the United States Court of Appeals for the Fifth Circuit affirmed (445 F.2d 801).

Granting the plaintiff's motion in forma pauperis and his petition for certiorari, the United States Supreme

> Court vacated the judgment and remanded the cause for a hearing and findings. In a per curiam opinion, expressing the view of six members of the court, it was held that a cause of action was stated by the complaint, since if the allegations were true, the state had violated the First and Fourteenth Amendments by discriminating against the Buddhist religion through denying the plaintiff a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhered to conventional religious precepts.

When the regulations imposed by prison authorities restricting religious practices fall more harshly on adherents of one faith than another, the Court will scrutinize the reasonableness of such regulations (Cooper v. Pate, 382 F.2d 518, 7th Cir., 1967; and Long v. Parker, 390 F.2d 816, 1968). The issue, therefore, is the reason-



ableness of the restrictions imposed on the petitioner: whether the opportunities afforded the petitioner are "reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners." (Cruz v. Beto, supra). And if the opportunity is not comparable to that afforded others, whether there is any reasonable ground for treating the petitioner differently.

In denying all reliefs sought by the petitioner, the District Court stated on:

> This Court finds that to allow petitioner to preach his "Doctrine" of violence, bloodshed and rebellion against authorities and to correspond with whomever he desires without proper surveillance would constitute "a clear and present danger of a breach of prison security or discipline or some other substantial interference with the orderly function of the institution." Knuckles v. Prasse, 435 F.2d 1255, 1256; Long v. Parker, 3rd Cir.,

390 F.2d 816, 820, 822.

> Accordingly, Petitioner's claims for relief in his First Amendment action and subsequent pleadings, whether or not his beliefs constitute a "religion", are hereby in all things DENIED. [emphasis added] (A-32)

The Court thus denied the petitioner all rights to practice his religion based on the findings that: 1) the petitioner's teachings might provoke violence; and 2) the petitioner's free exercise of religion without proper surveillance would endanger the orderly function of the prison.

In Long v. Parker (3rd Cir., 390 F.2d 816, 1968), a case cited by the District Court to deny petitioner's claims in the present case, the Court of Appeals held that Black Muslims should be allowed a reasonable opportunity to practice their religion in prison, despite the antagonistic nature of the teachings:



> Mere antipathy caused by statements derogatory of, and offensive to the white race is not sufficient to justify the suppression of religious literature even in a prison. Nor does the mere speculation that such statements may ignite racial or religious riots in a penal institution warrant their proscription. To justify the prohibition of religious literature, the prison officials must prove that the literature creates a clear and present danger of a breach of prison security or discipline or some other substantial interference with the orderly functioning of the institution. (at p. 822)

In the present case, there was no evidence to support the claim that

the teachings of the church per se presents clear and present danger, nor were there any findings that the petitioner is more dangerous than the other prisoners who enjoy the rights claimed by the petitioner. The discriminatory treatment is therefore totally unfounded. Note that petitioner claims retaliation and the Courts have noted solitary confinement was the response to his alleged "threats" revolving around scheduling a meeting. (A-11). Of course, retaliation as a fact has been found during the course of this litigation, Theriault v. Carlson (I), supra at 396 (A-42).

The District Court clearly erred in denying the petitioner all rights to practice his religion without any evaluation of the reasonableness of such a blanket denial. Furthermore, the Court completely deviated from all established principles in its reasoning that because the petitioner can not be permitted "unfettered" freedom in the practice of his religion "without proper surveillance," the prison can, instead of imposing proper surveillance on his practices, deny all rights to religious practice.



Moreover, all other followers, and there are more than a few,* are equally denied, denying them their religious freedom.

This Court, in the justly famous flag salute case, West Virginia State Board of Education v. Barnette (319 U.S. 624, 63 S.Ct. 1178) made the following statement in 1943, at a time when the exigency of war weighed heavily against the expression of individual dissent:

> We can have intellectual individualiam...and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are

*Although the District Court stated the religion had adherents in only 2 prisons, the contempt proceeding arose over correspondence with an individual in Florida. Theriault v. Carlson II, supra, at 394.

> so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. (at 1187)

Some people may have been roused to anger and even violence by observing the refusal to salute a flag but that could not lead to preventing the expression of ideas by those who refused. The Church of the New Song, petitioner urges, would not lead to violence but even if anything in its dogma suggests it might, that too is no reason to ban the whole religion to the petitioner and all other adherents.

Lower courts, the penal system, and the public need guidance from the Supreme Court in this area. Petitioner wants no more priviliges than any other religion yet he is allowed no religious participation or practice at all. Petitioner does not urge any



rites that violate neutral prison discipline regulations. Yet, because of the ideological content of his faith he is not allowed any religious expression. By remanding this case in this context, this Court can issue guidelines insuring that all religions are treated equally and religious ideas not banned because of claimed consequences. Rectifying this wrong will lead to a dearer, more consistent administration of justice.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

DATED: NEW YORK, NEW YORK
January 12, 1979

Respectfully submitted,

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Defendants-Appellees.

No. 78-1506.

United States Court of Appeals,
Fifth Circuit.

Aug. 16, 1978.

On appeal from a judgment of the United States District Court for the Western District of Texas, at El Paso, John H. Wood, Jr., J., appellee moved to strike appellant's notice of appeal on ground that it contained vile and insulting references to trial judge. The Court of Appeals, 574 F.2d 197, struck appellant's notice of appeal and gave appellant ten days in which to file proper notice of appeal. Following the filing of second notice of appeal, the Court of Appeals held that where appellant's original notice of appeal was stricken because of vile and insulting references to trial judge contained therein, appellant was given ten days in which to file a proper notice of appeal, but appellant then filed an equally abusive document, appellant's appeal would be dismissed with prejudice.

Appeal dismissed with prejudice.

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Where appellant's original notice of appeal was stricken because of vile and insulting references to trial judge contained therein, appellant was given ten days in which to file a proper notice of appeal, but appellant then filed an equally abusive document, appellant's appeal would be dismissed with prejudice.

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Appeal from the United States District Court for the Western District of Texas.

Before THORNBERRY, GODBOLD, and RUBIN, Circuit Judges.

BY THE COURT:

Upon the appellee's motion, this court struck the appellant's[1] notice of appeal and appeal because the appellant's notice of appeal contained vile and insulting references to the trial judge.[2] This court's order is reported at 574 F.2d 197 (5 Cir. 1978).[3] We gave the appellant ten days in which to file a proper notice of appeal and directed him to the appendix of forms in the Rules of Appellate Procedure for a suggested notice of appeal. Within the time allowed, the appellant filed a second notice of appeal; however, the appellant apparently has not taken this court seriously and has filed an equally abusive document.[4]

For failure to comply with the order of this court, we therefore direct that the appellant's appeal be dismissed with prejudice.

One of the most significant changes in our judicial system has been the recognition that the law and the resolution of conflict in the court should not turn on the nicety of pleadings and the triumph of form over substance. The modern view is that courts decide cases based on the merits of the issues and not from the pages of a writ book. This change is nowhere more evident than in the Rules of Civil Procedure which direct, "All pleadings shall be so construed as to do substantial justice."[5] Fed.Rules Civ. Proc. Rule 8(f). Moreover, this court and others have recognized that those unskilled in the law should not be held to strict standards of pleading. Hence, courts have developed the practice of liberally construing pro se petitions and pleadings.

Neither the modern view of civil pleading nor the liberal pro se practice of this court has done away with the time honored notion that the law and the courts of the United States are important parts of American society worthy of respect. This court simply will not allow liberal pleading rules and pro se practice to be a vehicle for abusive documents. Our pro se practice is a shield against the technical requirements of a past age; it is not a sword with which to insult a trial judge. Any complaint the appellant has about the conduct of the trial judge can be adequately

1. The appellant, Theriault, purports to appeal both for himself and one Jerry Dorrough. Since Theriault is not a member of the bar of this court his notice of appeal is effective only for himself. *Scarrella v. Midwest Savings and Loan*, 536 F.2d 1207 (8 Cir. 1976), *cert. denied*, 429 U.S. 885, 97 S.Ct. 237, 50 L.Ed.2d 166 (1976); *McKinney v. DeBord*, 507 F.2d 501 (9 Cir. 1974).

2. We did not include a copy of the notice of appeal in our original order because we had hoped that we could avoid publishing the calumnious document. Now that a comparison between the original notice of appeal and the second notice of appeal becomes necessary to the decision of the case, we feel compelled to publish the two notices of appeal. The original notice of appeal reads:

> Notice is hereby given by the Plaintiffs-Petitioners that they appeal the lying "Memorandim [sic] Opinion, Findings of Fact and Conclusions of Law" so hatefully and unAmericanly entered by the Dishonorable "Judge" John H. Wood, Jr., at El Paso, Texas, February 10, 1978, filed February 13, 1978, to the United States Court of Appeals for the Fifth Circuit, this February 14, 1978, so that a true decision can be entered as law and justice require.

3. The complete citation to the instant case is *Theriault v. Carlson*, 339 F.Supp. 375 (N.D.Ga. 1972), *vacated and remanded*, 495 F.2d 390, 395 (5 Cir. 1974), *rehearing denied*, 498 F.2d 1402, *cert. denied sub nom. Theriault v. Silber*, 419 U.S. 1003, 95 S.Ct. 323, 42 L.Ed.2d 279 (1974), *on remand*, 391 F.Supp. 578 (W.D.Tex. 1975), *vacated and remanded*, 547 F.2d 1279 (1977), *rehearing denied*, 551 F.2d 863, *cert. denied*, 434 U.S. 871, 98 S.Ct. 216, 54 L.Ed.2d 150 (1977), *rehearing denied*, 434 U.S. 943, 98 S.Ct. 441, 54 L.Ed.2d 306, *appeal dismissed pending proper notice of appeal*, 574 F.2d 197 (5 Cir. 1978).

4. The second notice of appeal reads:

> By "Order" of this Court of Thornberry, Godbold and Rubin, Circuit Judges, May 16, 1978, the plaintiffs-appellants were told to re-give notice of appeal, because the fact that District Judge John H. Wood, Jr., lied pointblankly in the decision appealed, when plaintiff Shiloh mentioned that fact as the *basis* of this appeal, plaintiff Shiloh's reference thereto is somehow "beneath the dignity of this court," according to the above mentioned three judges, who so ruled to reinforce the cat and mouse game the government is playing with plaintiffs at the expense of their human rights.
>
> Using their right to freedom of speech to tell the truth against the lying judge, who has *no right* to lie like that in the name of the court or law, etc., plaintiffs hereby again give notice that they appeal to the 5th Circuit Court of Appeals the lying decision of John H. Wood, Jr., entered February 13, 1978, in this case and purporting to overrule the Constitution thereby. The *grounds* for this appeal are that the said final decision and judgment are based on the pointblank lies of John H. Wood, Jr., and not on the Record herein and the Constitution.
>
> Today is May 23, 1978, and plaintiff request that this court not lie, too.

5. *See Cobb v. Lewis*, 488 F.2d 41 (5 Cir. 1974) for an example of our commitment to disregard irregularities in the notice of appeal in order to do substantive justice.

addressed in a civil manner in the appellant's brief. It is totally unnecessary to make any reference to the trial judge or the grounds of appeal in the notice of appeal. See Form 1, Fed.Rules App. Proc.

By failing to file a proper notice of appeal after this court directed that one be filed, the appellant has demonstrated his utter contempt for this court and the law.[6] This appellant has been involved in numerous other lawsuits[7] and there can be no doubt that he is as familiar with court practice as almost any layman. It is therefore our conclusion that the appellant's failure to file a proper notice of appeal must result in his appeal being dismissed with prejudice.

APPEAL DISMISSED WITH PREJUDICE.

6. This is not the first time the appellant has come to grief as a result of his behavior in the United States courts. Theriault has been held in contempt for calling a witness a "liar" and for personal abuse of a trial judge in open court. *Theriault v. United States*, 481 F.2d 1193 (5 Cir. 1973), *cert. denied*, 414 U.S. 1115, 94 S.Ct. 847, 38 L.Ed.2d 742 (1973); *United States v. Theriault*, 474 F.2d 359 (5 Cir. 1973), *cert. denied*, 411 U.S. 984, 93 S.Ct. 2278, 36 L.Ed.2d 960 (1973). At another trial, the trial judge ordered that Theriault be shackled during the trial. We upheld the trial court's action in *United States v. Theriault*, 531 F.2d 281 (5 Cir. 1976), *cert. denied*, 429 U.S. 898, 97 S.Ct. 262, 50 L.Ed.2d 182 (1976), *dist. ct. aff'd*, 555 F.2d 460 (1977), *cert. denied*, 434 U.S. 870, 98 S.Ct. 212, 54 L.Ed.2d 148 (1977).

7. *Theriault v. United States Court of Appeals for the Seventh Circuit*, 434 U.S. 953, 98 S.Ct. 493, 54 L.Ed.2d 321 (1977); *Theriault v. Carlson*, 339 F.Supp. 375 (N.D.Ga.1975), *vacated and remanded*, 495 F.2d 390, 395 (5 Cir. 1974), *rehearing denied*, 498 F.2d 1402, *cert. denied sub nom. Theriault v. Silber*, 419 U.S. 1003, 95 S.Ct. 323, 42 L.Ed.2d 279 (1974), *on remand*, 391 F.Supp. 578 (W.D.Tex.1975), *vacated and remanded*, 547 F.2d 1279 (5 Cir. 1977), *rehearing denied*, 551 F.2d 863, *cert. denied*, 434 U.S. 871, 98 S.Ct. 216, 54 L.Ed.2d 150 (1977), *rehearing denied*, 434 U.S. 943, 98 S.Ct. 441, 54 L.Ed.2d 306 (1977), *appeal dismissed*, 574 F.2d 197 (5 Cir. 1978); *United States v. Theriault, dist. ct. aff'd in part, vacated and remanded in part*, 526 F.2d 698 (5 Cir. 1976), *after remand dist. ct. aff'd in part and remanded in part*, 531 F.2d 281, *rehearing denied*, 534 F.2d 1407, *cert. denied*, 429 U.S. 898, 97 S.Ct. 262, 50 L.Ed.2d 182 (1976), *dist. ct. aff'd*, 555 F.2d 460 (1977), *cert. denied*, 434 U.S. 870, 98 S.Ct. 212, 54 L.Ed.2d 148 (1977); *Theriault v. Pittman*, 423 U.S. 818, 96 S.Ct. 155, 46 L.Ed.2d 114 (1975); *Theriault v. Pittman*, 423 U.S. 854, 96 S.Ct. 101, 46 L.Ed.2d 78 (1975); *Theriault v. Pittman*, 420 U.S. 989, 95 S.Ct. 1437, 43 L.Ed.2d 680 (1975); *Theriault v. Carlson*, 353 F.Supp. 1061 (N.D.Ga.1973), *reversed*, 495 F.2d 390, 395 (5 Cir. 1974), *cert. denied sub nom. Theriault v. Silber*, 419 U.S. 1003, 95 S.Ct. 323, 42 L.Ed.2d 279 (1974); *Theriault v. United States Court of Appeals for the Seventh Circuit*, 416 U.S. 980, 94 S.Ct. 2414, 40 L.Ed.2d 777 (1974); *Theriault v. Bartels*, 415 U.S. 979, 94 S.Ct. 1567, 39 L.Ed.2d 875 (1974); *Theriault v. United States*, 481 F.2d 1193 (5 Cir. 1973), *cert. denied*, 414 U.S. 1114, 94 S.Ct. 847, 38 L.Ed.2d 742 (1973); *Theriault v. United States*, 481 F.2d 1193 (5 Cir. 1973), *cert. denied*, 414 U.S. 1115, 94 S.Ct. 847, 38 L.Ed.2d 742 (1973); *Theriault v. United States, dist. ct. reversed and remanded*, 440 F.2d 713 (5 Cir. 1971), *dist. ct. aff'd*, 474 F.2d 359 (5 Cir. 1973), *cert. denied*, 411 U.S. 984, 93 S.Ct. 2278, 36 L.Ed.2d 960 (1973); *Theriault v. United States, sentence vacated and case remanded*, 434 F.2d 212 (5 Cir. 1970), *cert. denied*, 404 U.S. 869, 92 S.Ct. 124, 30 L.Ed.2d 113 (1971), *aff'd*, 467 F.2d 486 (1972), *cert. denied*, 411 U.S. 984, 93 S.Ct. 2280, 36 L.Ed.2d 961 (1973); *Theriault v. Establishment of Religion on Taxpayers' Money in the Federal Bureau of Prisons*, 411 U.S. 946, 93 S.Ct. 1937, 36 L.Ed.2d 418 (1973); *Theriault v. Silber*, 405 U.S. 1048, 92 S.Ct. 1328, 31 L.Ed.2d 590 (1972); *Theriault v. United States*, 447 F.2d 1361 (5 Cir. 1971), *cert. denied*, 404 U.S. 1064, 92 S.Ct. 750, 30 L.Ed.2d 752 (1972); *Theriault v. United States Court of Appeals for the Seventh Circuit*, 404 U.S. 936, 30 L.Ed.2d 269 (1971); *Theriault v. Pittman*, 404 U.S. 952, 92 S.Ct. 156, 30 L.Ed.2d 269 (1971); *Theriault v. Mississippi*, 404 U.S. 818, 92 S.Ct. 156, 30 L.Ed.2d 119 (1971); *Theriault v. Harris*, 404 U.S. 870, 92 S.Ct. 125, 30 L.Ed.2d 113 (1971), 403 U.S. 923, 91 S.Ct. 2238, 29 L.Ed.2d 702, *rehearing denied*, 404 U.S. 877, 92 S.Ct. 34, 30 L.Ed.2d 125 (1971); *Theriault v. Blackwell*, 437 F.2d 76 (5 Cir. 1971), *cert. denied*, 402 U.S. 953, 91 S.Ct. 1637, 29 L.Ed.2d 122 (1971); *Theriault v. Daggett*, 401 U.S. 983, 91 S.Ct. 1205, 28 L.Ed.2d 335 (1971); *Theriault v. United States*, 401 U.S. 983, 91 S.Ct. 1205, 28 L.Ed.2d 335 (1971); *Theriault v. United States*, 409 F.2d 1313 (5 Cir. 1969), *cert. denied*, 396 U.S. 933, 90 S.Ct. 274, 24 L.Ed.2d 231 (1969); *Theriault v. United States*, 402 F.2d 792 (5 Cir. 1968), *cert. denied*, 395 U.S. 965, 89 S.Ct. 2110, 23 L.Ed.2d 751 (1969), *rehearing denied*, 396 U.S. 870, 90 S.Ct. 42, 24 L.Ed.2d 128 (1969); *Theriault v. Peek*, 406 F.2d 117 (5 Cir. 1968), *cert. denied*, 394 U.S. 1021, 89 S.Ct. 1644, 23 L.Ed.2d 47 (1969); *Theriault v. United States*, 268 F.Supp. 314 (W.D.Ark.1967), *aff'd*, 401 F.2d 79 (8 Cir. 1968), *cert. denied*, 393 U.S. 1100, 21 L.Ed.2d 792 (1969), *rehearing denied*, 394 U.S. 939, 89 S.Ct. 1201, 22 L.Ed.2d 474 (1969); *Theriault v. Mississippi*, 433 F.2d 990 (5 Cir. 1970); *Theriault v. Mississippi*, 390 F.2d 657 (5 Cir. 1968).







Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

Dr. Harry W. THERIAULT,
Plaintiff-Appellant,

v.

Frederick SILBER, Director, United States Chaplain Service, et al.,
Defendants-Appellees.

No. 78-1506.

United States Court of Appeals,

Fifth Circuit

May 16, 1978

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Dr. Harry W. Theriault, pro se.

Jamie C. Boyd, U. S. Atty., San Antonio, Tex., Michael T. Milligan, Sp. Asst. U.S. Atty., El Paso, Tex., for defendants-appellees.

Joseph S. Blair pro se, amicus curiae.

Appeal from the United States District Court for the Western District of Texas.

Before THORNBERRY, GODBOLD AND RUBIN, Circuit Judges

ORDER

The appellee moves to strike the appellant's notice of appeal and dismiss the appellant's appeal in the instant case because the appellant's notice of appeal contains vile and insulting references to the trial judge. We have examined the notice of appeal and agree that it contains disrespectful and impertinent references to the trial judge. See Rule 12(f), F.R. Civ. P. Such documents are beneath the dignity of this court. Nothing in our liberal pro se practice dictates that this court receive abusive documents. The appellee's motions to strike the notice of appeal and dismiss the appeal are therefore GRANTED. Appellant has ten days from the issuance of this Order to file a proper notice of appeal. If he does so, his appeal and motion to appoint counsel will be reinstated. The appellant is further directed to Rule 3(c). Rules of Appellant Procedure and Form 1 in the appendix of forms of the appellant

rules for a suggested form for notice of appeal.

IT IS SO ORDERED



IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF TEXAS

EL PASO DIVISION

| | | |
|---|---|---|
| HARRY THERIAULT, AKA SHILOH AKA BISHOP OF TELLUS | ) | |
| | ) | EP-72-CA-212 |
| V. | ) | |
| FREDERICK SILBER, ET AL. | ) | |

MEMORANDUM OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

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The United States Court of Appeals for the Fifth Circuit has directed this Court to "conduct further proceedings on the present record and on such a supplemental record as it and the parties initially deem proper to make more explicit findings of fact and conclusions as a Finding of Fact that Theriault's beliefs do not constitute a religion. Also the Appellate Court instructed this Court to reconsider what constitutes a religion "by a thorough study of the existing case law as well as an appropriate evidentiary exploration of philosophical, theological and other related literature and resources on the issue", this being "just the sort of thing" that "should be ventilated first in the Trial Court".

Before proceeding to a consideration of the new material submitted by Mr. Harry W. Theriault, specifically that

submitted on January 20, 1977, and before confronting the issue of what constitutes a religion, an examination of the record compiled during the seven months' period following the beginning of trial on August 20, 1974 would seem to be appropriate.

The El Paso case, EP-72-CA-212, commenced on August 17, 1972 and evidence was being received as late as March 18, 1975. During the period from commencement of trial on August 20, 1974 to the entry of Final Judgement on March 18, 1975 various extensive Open Court hearings were held as shown by a 311 page Transcript documenting the proceedings. This Court received the Atlanta case, No. CA 13872, which had been ordered consolidated with the El Paso case, on March 17, 1975. The El Paso file, together with the records received from the Atlanta case, comprises two legal size cabinet drawers and consist of approximately 21 Volume plus from eight to ten inches of other unfiled, but received papers. The record is made up of seven volumes of pleadings; one volume of plaintiff's exhibits; two volumes of defendants' exhibits; eleven volumes of Transcripts, mostly from the Atlanta case, and eight to ten inches of additional unfiled documents. Judgment was entered on March 18, 1975 dismissing this suit on the merits. Notice of appeal was filed on April 8, 1975. While this Court found then and still believes the monumental record in all of these consolidated cases demonstrates adequate ventilation of this "sort of thing", the Court of Appeals on April 29, 1977, over two years later, vacated the Judgment of this Court and remanded the case back for further "ventilation".



Using the nomenclature established by Judge Ainsworth in this very case styled Harry W. Theriault v. Norman A. Carlson, 495 F. 2d 390, 1974, this would be labeled Theriault IV. In his Opinion in Theriault v. Carlson, supra. Judge Ainsworth outlined the history and the background of Harry W. Theriault and the organization called the "Church of the New Song". On June 18, 1970, in Theriault I, "Dr. Harry W. Theriault" and a fellow inmate, Rev. Jerry M. Dorrough, filed a First Amendment Action against the Catholic and Protestant Chaplains at Atlanta alleging various deprivations of their constitutional right to freely practice their religion. Dr. Theriault acquired his Doctor of Divinity Certificate through a mail order application. Theriault then, as the self-appointed Bishop of Tellus or Bishop of the Earth, ordained Dorrough First Revelation Minister of the "Church of the New Song" and conferred upon him in the Courtroom on the date of trial in 1970 the Decrees of Doctor of Divinity, Doctor of Philosophy and Bachelor of Philosophy. See Theriault v. Carlson, 495 F. 2d 392 at Footnote 2.

After the Trial Court in Theriault I announced his intention to allow Theriault a "trial run" in holding his religious services at a final hearing in Atlanta held in January, 1972, several correctional officers and other prison officials from Marion, Illinois Penitentiary testified about various threats by Theriault of mass violence, veiled threats of murder, actual physical assault and battery of prison officers and destruction by Theriault of prison property. Theriault v. Carlson, supra, at page 392. One such incident

occurred on April 1, 1971 following a request by Theriault to use the Chapel or Auditorium for the purpose of holding an organizational meeting:

"Theriault, an escape artist by his own admission, having several times broken away from Federal custody, was considered by prison officials to be a high escape risk. Moreover, he and his followers were known trouble makers. Theriault was told of the prison policy requiring permission from the Chaplain to secure a meeting place and it was the Chaplain's duty to coordinate religious activities. Theriault declined to follow instructions and announced his intention to hold a meeting warning prison authorities that if they used violence to break it up there would be bloodshed. Because of his threats, Theriault was placed in solitary confinement, to which he reacted by kicking the correctional supervisor. He later broke the bed from the cell wall, destroyed the toilet with a piece of angle iron, shoved the bed against the cell door and warned he would kill anyone who attempted to enter. "Emphasis supplied) Theriault v. Carlson, supra, at page 393.

Theriault II, this case, was filed subsequent to the Atlanta hearing after Theriault was transferred to the Federal Penitentiary at La Tuna, Texas. The Complaint filed by Theriault was dismissed forthwith by the District Court for the Western District of Texas by the Hon. Judge Ernest Guinn and Theriault appealed. Theriault III was filed in the District Court at Atlanta wherein Theriault alleged a failure to comply with Judge Edenfield's ruling. A four



day hearing was held in Atlanta resulting in a finding of contempt against Directors Carlton and Silber. See Theriault v. Carlson (Northern District of Georgia, 1973) 353 F. Supp. 1061. The Government appealed. On appeal Theriault III was overturned and the contempt finding was held to be an abuse of discretion and was reversed, annulled and set aside. See Theriault v. Carlson, 495 F. 2d. 390 (1974) at page 395. Theriault III was also vacated and remanded for a full evidentiary hearing and was consolidated with this case, Theriault II. After the hearings and compilation of the record as outlined above pursuant to the Order of the United States Court of Appeals for the Fifth Circuit in Theriault v. Carlson[1/] this Court, having inherited the case from the Hon. Judge Ernest A. Quinn at his death, dismissed the case with extensive and comprehensive accompanying Findings of Fact and Conclusions of Law. Approximately two years and one month later, the case was vacated and remanded for "further ventilation . . . of appropriate evdentiary exploration of philosophical, theological and other related literature and resources", specifically referring to the materials submitted by Theriault to the Court of Appeals on January 20, 1977 which were filed in the District Court on July 8, 1977 as well as a copy of:

"The Living Gospel
Of
The New Song

for
The People of the Light"

1/ 495 F. 2d 393 (1974)

"In Fullfillment of the Prophecy 'They sang a new song . . . for the healing of the nations.'"

"(Book of Revelation, 5:9 and 14:3 and 22:2)"

"An Inspired Text"

"THE PARATESTAMENT
in the New Language of the Church"

"CHURCH OF THE NEW SONG
Iowa City, Iowa 52240"

The Court has now considered these additional submissions of Harry W. Theriault as well as a number of religious encyclopedias such as the Encyclopedia of Religion and Ethics, James Hastings' edition, Volume 10 (Scrivner's sons, 1951), The Universal Jewish Encyclopedia, the new Catholic Encyclopedia (Catholic University of America, 1967), the Encyclopedia of Islam, Lewis, et al. edition, E. J. Brill, 1965, as well as the King James version of the Holy Bible.

EXPLORATION OF PHILOSOPHICAL, THEOLOGICAL AND OTHER RELATED LITERATURE AND RESOURCES

Before proceeding to an examination of the works of Harry W. Theriault, the Court will first examine the aforementioned resources and other materials with respect to the definition of religion. Implicit in such an examination is a study of what the religions say of themselves. Thus, each of the religious texts will of course, take on the bias



of its faith. The Judeo-Christian tradition, with which we are most familiar, recognizes the existence of a superior supernatural and all-powerful diety. a commensurate attitude of submission to that diety on the part of the practitioner or believer. Thus, a leading Protestant work, the Encyclopedia of Religion and Ethics, James Hastings Ed., Vol. 10, at page 675, states:

"It is true that there is in religion a characteristic submission (not necessarily an attitude of pacifity) to the supreme of the divine will -- 'Thy will be done.'"

This also refers to "dependence, prayer, sacrifice, necessity of moral behavior, etc" as important religious concepts. Ibid at page 678.

The Universal Jewish Encyclopedia, Volume 9, page 124, also points out this Supreme Being-creature relationship "of a creature overwhelmed by his nothingness in contrast to the overpowering, mysterious and supreme, Being". The text goes on to examine the origins of the term "religion" which originally was a latin word which Cicero explained as being derived from the latin verb "re-legre" which means to "care or practice", being the opposite of "neg-ligere" meaning "to neglect" and would thus entail "conscientiousness, scrupulousness, respect for what is sacred . . . devotion to the gods". Ibid at page 125. Other possible derivations are discussed in the same text. The Jewish Encyclopedia goes on to conclude that a religion will then develop into a community, congrega-

tion or church with a cult of ritual and ceremony, code of morality or standards of law and discipline for the group with a creed of beliefs with respect to God. Ibid at page 126

The New Catholic Encyclopedia again reaffirms the concept of the Supreme Diety in religion in its concept of "the sacred". New Catholic Encyclopedia, Volume 12, at page 240. "Sacred" is explained as an "essentially ambivalent character which makes man feel that one is irresistably attracted by its grandeur and frightened by its superiority" Ibid , at page 241. Again, the attitude of dependence upon the "sacred" . . . "a reality superior to man, a reality that is beyond the control of man's will and all of the forces of nature". Ibid at page 241. The New Catholic Encyclopedia goes on to discuss the topics of prayer, devotion, ritual, priesthood and other religious attitudes with respect to this sacred supreme reality.

The Encyclopedia of Islam distinguishes between din (religion) and dawla (government,politics) and sets forth that Moslems nevertheless believe that their religion is also a form of government. Encyclopedia of Islam , Lewis, et al. edition, E. J. Brill, 1965, Volume 2, Page 295. In the discussion of din, the Encyclopedia of Islam points out the following: "Religio [sic] evokes primarily that which binds man to God; and din, the obligations which God imposes upon His 'reasoning creatures'. Now, the first of these obligations is to submit to God and surrender oneself to Him since the definition or the etymological



sense of Islam is 'the surrender of self (to God), . . . .'"

The concept of the Supreme Being, Supreme Diety or Supreme reality is the most familiar and perhaps easiest to understand for those of us in the Judeo Christian tradition. The pre-eminence of this concept and understanding of religion is of considerable historic significance in the United States. The Declaration of Independence stated:

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men deriving their just powers from the consent of the governed." Declaration of Independence, U.S.C.A. Constitution, Article I, Section 1 to Section 8, Clause 3, at Page 2.

While this belief in a Supreme Being or Creator may be pervasive in our society this belief cannot be sustained as a distinguishing characteristic of religion. In United States v. Seeger, 85 S. Ct. 850, 865 (1965), Mr. Justice Douglas in his Concurring Opinion in that case pointed out the insufficiency of a belief in a Supreme Being and a concept of a personal God in the writing of Hinduism and Buddhism.

In examining the materials submitted by Harry W. Theriault to the Appellate Court, it is important to note in Mr. Theriault's writings which he entitles

"The Paratestament" or "The Living Gospel of the New Song" that Mr. Theriault does not simply allege to hold a concept of a Supreme Being or Diety nor the vaguer concepts of reality or God as outlined by Hinduism and Buddhism, but rather claims to be Jesus Christ. In his Paratestament, Chapter 7, Versus 6 through 52, note particularly Verse 9:

"So they began to call me Jesus; and my fame spread with this name, and reached King Herod's ears; and his soliders were after me, and so were Governor Pilate's publicans, and especially the high priest of Palestine."

Verse II then states:

"After this, I had gone throughout the whole territory of the Jordan river, preaching; Repent, and you are forgiven."

Verse 45 states:

"I remember saying, Eli, Eli, Iama sabachthani." (These are the words of Jesus Christ as he died on the Cross as recorded in the New Testament.)

EXISTING CASE LAW

As indicated above, the threshold issue before this Court to decide is "whether the beliefs professed by [petitioners] . . . are sincerely held and whether they are, in [their] own scheme of things, religious."



See United States v. Seeger, 380 U. S. 163, 185, as cited by the Fifth Circuit of Appeals in Theriault 1 and II.

2/In the Seeger case involving conscientious objections to war and violence, the test of what was meant by "religious training and belief so as to embrace all religious and to exclude essentially political, sociological or philosophical views" (Seeger, supra, at page 165) was whether such "belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God". (Seeger, supra, at page 166)

It should be noted that in the conscientious objector cases the beliefs held by petitioners were in opposition to violence and war in contrast to the violence and destructiveness of plaintiff in this case.

In view of the "long list of court actions to which [petitioner] is a party, some of which are still pending, as well as the lengthy prison record which he has established over the years," this Court will employ "sharp and careful scrutiny of his activities, including his claim of religious sincerity." See Theriault 1 and II, 5th Cir. 1974, 495 F. 2d at page 394. For, as reiterated by the Fifth Circuit in Theriault 1 and II, supra, at page 394, "First Amendment freedoms are not absolute. They are properly restricted when a sufficiently important governmental interest appears. United States v. O'Brian, 391 U.S. 367, 376. . . "

2/ See Supra, (495 F. 2d at p. 395)

Further, this Court recognizes, as does the Fifth Circuit in Theriault I and II, supra, at p. 395, the difficulty in establishing satisfactory and precise standards by which to judge the bona fides of petitioner's alleged religion. Whatever the difficulties are, they do not, by their existence, obviate the necessity of deciding the issue nor do they provide an impenetrable obstacle "to denials of First Amendment protection to so-called religions which tend to mock established institutions and are obviously shams and absurdities and whose members are patently devoid of religious sincerity. . ." Theriault I and II, supra, at p. 395.

Several facts developed during the proceedings had at Atlanta in the case of Theriault v. Carlson, 339 F. Supp. 375, and succinctly restated by the Fifth Circuit in Theriault I and II, are relevant to this Court's consideration herein. Among these are:

1. That "the Eclatarian faith, or Church of the New Song, was originally founded by Theriault and Jerry M. Dorrough at the federal penitentiary at Atlanta, Georgia, allegedly as the result of visions experienced by Theriault at the Marion, Illinois federal penitentiary in which he received prophetic messages from 'Eclat' informing him that he was the 'Eclatarian Nazarite' and directing him to establish the Church of the New Song." Theriault I and II, supra, footnote 1, p. 391;

3/ Supra at p. 391, Footnote 1.



2. That "Theriault acquired his Doctor of Divinity certificate through a mail order application. Theriault then, as self-appointed 'Bishop of Tellus' ordained Dorrough First Revelation Minister of the Church of the New Song . .", supra, footnote 2, p. 392;

3. That when Theriault "and Dorrough decided to file this complaint (in the U. S. District Court for the Northern District of Georgia, Theriault, et al. v. Carlson, et al., supra) they needed the proper caption. Dorrough came forward with his suggestion which they adopted: 'you put yourself down, you be the head of the church,, [sic] that's the Bishop, you put yours, and put me down as the First Minister," supra, footnote 3, p. 392;

4. That the "Eclatarian faithful, aside from one secretary, are to be found only in the federal penitentiaries of Atlanta and Marion." Theriault, 339 F. Supp. 375, 377 N.3. Of course, now the federal penitentiary at La Tuna, Texas can be added to the list as the petitioner Theriault is now incarcerated there;

5. That "at the final hearing at Atlanta held in January, 1972, several correctional officers and other prison officials from the Marion, Illinois

penitentiary testified about various threats by Theriault of mass violence, veiled threats of murder, actual physical assault and battery of prison officials, and destruction by Theriault of prison property." Theriault I and II, supra, 495 F. 2d at p. 392;

6. To this incomplete, but representative, list of relevant factors can be added Theriault's conviction before this Court by a Jury of assault on federal officers and destruction of government property arising out of an incident occurring during Theriault's transfer to the Federal Penitentiary at La Tuna, Texas, during which Theriault, handcuffed and confined by legirons,[sic] vaulted over the back seat of the government vehicle in which he was being transported by Federal officers and, by jamming his feet through the steering wheel of the vehicle, caused it to proceed out of control and overturn injuring the federal officers so transporting him;

7. That Harry W. Theriault claims to be, among other things, the second Messiah, the Bishop of Earth (Tellus) (See generally Paratestament, Theriault) supra; and

8. That in the document submitted by Harry W. Theriault he claims that he would have established a new World order by 1976.



The Court has examined all of the documents, testimony and records made of record in the instant case together with the evidence presented at the various hearings had herein and the arguments of all parties and finds the petitioner's contentions to be lacking.

The Church of the New Song appears not to be a religion, but rather as a masquerade designed to obtain First Amendment protection for acts which otherwise would be unlawful and/or reasonably disallowed by the various prison authorities but for the attempts which have been and are being made to classify them as "religious" and, therefore, presumably protected by the First Amendment.

Rather than urging upon its followers any particular theology or philosophy of life, the Church of the New Song appears to encourage a relatively non-structured and free-form, do-as-you-please philosophy, the sole purpose of which is to cause or encourage disruption of established prison discipline for the sake of disruption. Disruption of and/or problems for prison authorities is not the result of this so-called religion; it is rather the underlying purpose of it. For example, the "Church's" one attempt at a paschal type feast produced a tongue-in-cheek request for prison authorities to supply steak and wine. Further, as Warden Rigsby has testified, the services which petitioner's followers were allowed to hold at the Atlanta penitentiary were nothing more than "gripe sessions" designed to attempt to gain advantages over other inmates

not belonging to the "group" and were totally lacking in anything approaching religious content.

Petitioner and his cohorts have formed an organization whose purpose is to improve the position of member prison inmates vis-a-vis the prison administrations. To obtain leverage for the organization and to enable it to operate more freely within the Federal Penitentiaries, petitioner has christened it a "religion" and endowed it with the trappings thereof. Thus, it is that the unmistakeable stench of the skunk is found emating from that which petitioner has declared a rose.

The Fifth Circuit has held that some standards must be applied to determine the legitimacy and validity of a "religion" and has recommended that such standards be applied with sharp and careful scrutiny to petitioner's "Church of the New Song". The exclusively political and non-religious nature of the doctrine of the "Church of the New Song" as that doctrine has developed in the writings of the petitioner over the past three years, together with the violent and raucous tone of its services at the Atlanta Penitentiary, indicate that the "Church" has totally failed the "trial run" test which it received in the Northern District of Georgia three years ago.

The professed belief of Mr. Theriault that he is the second Messian (Paratestament, Theriault, Chap. 7, V.1-114) appears to this Court to be insincere and, like the rest of the actions of the



petitioner, are "essentially political, sociological and philosophical". The professed views of Mr. Theriault that he "would have established a new World order" with Harry W. Theriault as the head of the Order (see generally Paratestament, Theriault) supra are, in the opinion of the Court, more closely akin to the megalomania of Adolph Hitler and the Nazis or Charles Manson and his "family" than any "belief... that 'occupies a place' parallel to that filled by the orthodox belief in God".

The First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof". In interpreting the Amendment, the Courts have recognized with respect to prisoners' religious freedom that:

"Although the law acknowledges a prisoner's 'forum of conscience' deserving of protection, Remmers v. Brewer, 494 F. 2d 1277 (8th Cir. 1974) it also recognizes that a person, in or out of prison, may not, in the name of religion, become a law unto himself. As we said in Evans v. Ciccone, [377 F. 2d 4(8th Cir. 1967]; 'Freedom of religion can never mean . . . freedom to flagrantly disregard reasonable rules of conduct in or out of prison'. 377 F. 2d at 6." (Emphasis supplied.) Proffitt v. Ciccone, 506 F. 2d 1020 (1974).

"It has never been held that upon entering a prison one is entirely bereft of all his civil rights and forfeits every protection of the law.'" Sewell

v. Pegelow, 291 F. 2d 196, 198 (4 Cir., 1961) See also Pierce v. La Vallee, 293 F. 2d 233 (2 Cir. 1961).

This statement was cited with approval in the case of Brown v. Peyton, 437 F. 2d 1228 (4th Cir., 1971). Judge Winter, writing for the majority of the Three Judge Panel and also citing Cooper v. Pate, 378 U. S. 546, 84 S. Ct. 1733, 12 L. Ed. 2d 1030 (1964) went on to affirm:

"These cases clearly establish that a prisoner does not shed his first amendment rights at the prison portals."

In Brown, the majority pointed out that:

"While first amendment rights are 'preferred" rights, nonetheless, they are not unlimited. The state may restrict religious acts if it can be shown that they pose 'some substantial threat to public safety, peace or order,' and that there is a 'compelling state interest in the *** regulation.' Sherbert v. Verner, 374 U. S. 398, 403, 83 S. Ct. 1790, 1793, 10 L. Ed. 2d 965 (1963)."

Judge Winter pointed out certain State interests upon which prison authorities may justify repression or restriction of First Amendment rights of prisoners. They included:

1. Prison officials have to confine dangerous men in unpleasant circumstances.



2. They must protect the public at large, prison employees and also other prisoners, who are almost totally dependent on the prison for their well being.

3. Prison authorities have a legitimate interest in the rehabilitation of prisoners.

4. The State has an interest in reducing the burden and expense of administration.

The majority in Brown also noted that "many restrictions on First Amendment rights are undoubtedly justifiable as part of the punitive regimen of a prison: confinement itself, for example, prevents unlimited communication with the outside world but is permissible in order to punish and deter crime; . . ." Brown, supra, at page 1231.

The Court in Brown held that the "burden of proving [paramount state interests] rests on the state". This Court agrees.

Turning to the case at Bar. The petitioner, Harry W. Theriault, is apparently requesting (assuming that his political activities are entitled to the status of a religion) the following relief;

1. To form a seminary to train his ministers. (R. Vol. VI Tr. 1, 11-70-71, pp. 145-146)

2. To preach the "Eclatarian Demandate of Natural Rights", including the right to pursue happiness. (Id. pp. 147-148)

3. To wear a beard because of the awe and respect that it inspires in his followers. (Id. pp. 149-150)

4. The right to correspond with such figures as Jane Fonda, Lewis Wolfson, Sam Bataglia and Felix Alderisio (the last two individuals alleged to be Mafia figures in the Government's brief) as well as his fellow prisoners, all for the purpose of soliciting financial contributions. (Id., pp. 151-165)

5. The right to hold meetings where he presides upon short notice without approval of prison authorities. Theriault stated that he demanded in one instance immediate access to the Chapel at La Tuna and when his demand was not met he broke down the door of the chapel. (Id., pp. 50-54)

6. The record is replete with the actions of Mr. Theriault which indicate to this Court that Mr. Theriault wants all the privileges of a chaplain rather than an inmate of the institution wherein he resides.



As was stated by Judge J. Marshall in Hundley v. Sieloff, 407 F. Supp. 543, 545 (1975) in another case involving Mr. Theriault's organization:

"In Cruz v. Beto, 405 U.S. 319, 92, S. Ct. 1079, 31 L. Ed. 2d 263 (1972) (per curium), the court in considering the claims of a Buddhist prisoner who claimed he was punished for practicing his religion, stated that not

> 'every religious sect or group within a prison - however few in number - must have identical facilities or personnel. A special chapel or place of worship need not be provided for every faith regardless of size; nor must a chaplain, priest, or minister be provided without regard to the extent of the demand. But reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty.' 405 U.S. at 322 n. 2, 92 S. Ct. at 1081.

"Mr. Chief Justice Burger, concurring, stated further that,

"There cannot possibly be any constitutional or legal requirement that the government provide materials for every religion and sect practiced in this diverse country. At most, Buddhist materials cannot be denied to prisoners if someone offers to supply them.' 405 U.S. at 323, 92 S. Ct. at 1082."

In conformity with Cruz, supra, it appears to this Court that Petitioner's demand for seminary facilities, the right to exercise unfettered authority over the prison chapel, and the right to all of the privileges of a prison chaplain should be, and the same are hereby, in all things DENIED in light of the compelling State interests heretofore enumerated. Even if the so-called "Church of the New Song" is in fact a religion (which it obviously is not), reasonable and necessary restraints and regulations may be imposed by the penal institution on all of its inmates. To give a prisoner who is an admitted escape artist and who has been convicted of assault and battery on corrections officers the unrestricted freedom which he demands would make a mockery of the corrections system and would afford him privileges not available to other inmates, unless they joined his union.

Reasonable State prison regulations as to personal hygene [sic] and grooming have long been upheld in this Circuit. See Brooks v. Wainwright, 428 F. 2d 652 (5th Cir., 1970). Such regulations have been sustained in other Circuits as well. See e.g. Proffitt v. Ciccone, 506 F. 2d 1020 (8th Cir., 1974); Pinehart v. Brewer, 491 F. 2d 705 (8th Cir., 1974) Lay, J., dissenting).

The general rule is that Courts should not interfere in the internal management or functions of State prisons. In the recent case of Hill v. Estelle, 537 F. 2d 214 (5th Cir., 1976) the Fifth Circuit upheld the decision in Brooks in a per curium opinion:



"In Brooks we stated that haircut and shaving regulations in a state prison did not violate the inmates' free dom of expression, or due process of law." Hill, supra at p. 215.

This Court agrees with the rationale of Hill and under the separation of powers would not interfere with the duty of the Executive Branch to administer the prisons "where prisoner regulations are neither unreasonable nor arbitrary" with respect to hair length or beards. Hill, supra, 537 F. 2d at p. 215. See also Williams v. Hoyt, 556 F. 2d 1336 at 1339 (5th Cir., 1977). Accordingly, petitioner's demand for the right to grow his beard is hereby DENIED.

The denial of Petitioner's demand to espouse in prison his particular creed of the "Eclatarian Demandate of Natural Rights" cannot be held by this Court to be an unconstitutional abridgement of the First Amendment. When dangerous felons are involved, it has been held that even the refusal of prison authorities to allow a high-risk prisoner to attend chapel, much less the right to "preach" to fellow inmates, is not a denial of First Amendment rights. Sharp v. Sigler 408 F. 2d 966 (8th Cir., 1960). The Court states in Sharp v. Sigler at page 970:

"While freedom to believe is absolute, the exercise of religion is not."

It has also been held that:

"Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.' Reynolds v. United States, 98 U. S. 145, 166, 25 L. Ed. 244 (1879)."

The "gospel" Mr. Theriault espouses proclaims a new World Order with a new "bishop of the earth" - Harry W. Theriault. (See generally Paratestament, Theriault) supra. Mr. Theriault has been convicted of escape involving assault of federal officers. Theriault v. United States, 409 F. 2d 1313 (5th Cir., 1969) (reversed as result of change in insanity law while case pending appeal) wherein Mr. Theriault leaped from the back seat of a Deputy Marshal's car, obtained the Marshal's gun, thereby gaining control over the Marshals and then abandoned the Marshals in the country chained to a tree. Except for the resourcefulness of the Marshals, Mr. Theriault's actions could have resulted in their deaths. Mr. Theriault has been found guilty of escape and assault in another case involving quite similar circumstances. See United States v. Theriault, 531 F. 2d 281 (5th Cir., 1976).

Theriault again leaped from the back seat of a Marshal's car causing the wreck of the government automobile and injuring both Marshals. Apparently, at least four United States Deputy Marshals have come near death due to the violent actions of the Petitioner. The Appellate Court in the second escape case noted the prior contempt convictions of the



Petitioner in upholding the Trial Judge's refusal to remove Petitioner's shackles during Courtroom proceedings. The contemptuous acts on the part of Theriault "included the use of foul language and calling a witness a liar, and we noted a communication from appellant (petitioner herein) to the trial judge that threatened 'another Attica' escape and bloodshed". 351 F. 2d at 284. The dangerous propensities of the petitioner toward assault and violence have been established on numerous occasions.

This Court finds that to allow petitioner to preach his "Doctrine" of violence, bloodshed and rebellion against authorities and to correspond with whomever he desires without proper surveillance would constitute "a clear and present danger of a breach of prison security or discipline or some other substantial interference with the orderly function of the institution". Knuckles v. Prasse, 435 F. 2d 1255, 1256; Long v. Parker, 3rd Cir., 390 F. 2d 816, 820, 822.

Accordingly, Petitioner's claims for relief in his First Amendment action and subsequent pleadings, whether or not his beliefs constitute a "religion", are hereby in all things DENIED.

Therefore, having considered the entire record in all of these consolidated cases, the arguments of counsel and the applicable law, including a thorough exploration and study of "philosophical, theological, and other related additional literature and resources on the issue" of religion, vel

non, and having once again further "ventilated this sort of thing", practically to the point of hyperventilation, the Court makes the following "more explicit" additional Findings of Fact and Conclusions of Law.



FINDINGS OF FACT

1. Early in 1971, while incarcerated at the Federal Penitentiary at Atlanta, Georgia, petitioner, Harry W. Theriault, and Jerry M. Dorrough formed an organization among their fellow prisoners and denominated it the "Church of the New Song". Over the past five years the organization has met with some small success within State and Federal prisons, but has been of negligible appeal outside of prison.

2. Petitioner contends without dispute and the Court so finds that he is the leader and head of the "Church of the New Song". His pronouncements on the tenets, beliefs, ideas, practices and general principles of the "Church of the New Song" are thus authoritative of the official position of the "Church of the New Song".

3. Petitioner has committed various and numerous infractions of prison rules during his stay at the Federal Correctional Institution at La Tuna, Texas beginning in March of 1972.

4. The beliefs professed by the petitioner are not sincerely held and do not in their own scheme of things constitute a "religion" nor are they sincerely of a "religious" character.

5. The so-called "Church

of the New Song" does not meet the criteria adopted by this Court in its analysis above to entitle it to First Amendment protection as a religion. It is clearly a sham designed and calculated to obtain favored treatment for its members incarcerated in various prisons and has no measurable following outside Federal Penitentiaries.

6. There is no evidence of probative force to substantiate plaintiff's claims that defendants violated the "establishment of religion" clause of the First Amendment in their provision of religious services to the inmates at Federal prisons.

7. There is no evidence of probative force that defendants or anyone acting for them or under their authority or control illegally reported anything to anyone in any way concerning any of petitioner's activities or that defendants in any manner improperly or illegally interfered with or impeaded [sic] the petitioner or his followers in attempting to establish or practice a "religion".

8. That the claim of Mr. Theriault to be the second Messiah is merely a front for what is essentially a political "union" or organization with primary goals of establishing a unit to bargain with prison officials and ultimately establish a new social order based on "votaries" with Harry W. Theriault as its head.



9. While an inmate does not forfeit all of his rights under the Constitution, he does lose some of them such as the most valued one, i.e. the right to his freedom. Thus, he is by necessity subject to reasonable and necessary disciplinary rules, regulations and measures, including those imposed by the penal institution in this very case.

10. The Court adopts, reaffirms and incorporates herein, and finds even more applicable now, all of the Findings of Fact and Conclusions of Law that were made in his earlier decision and Judgment filed in this case. (See 391 F.Supp. 678).

## CONCLUSIONS OF LAW

1. Any restraints and/or disciplinary measured invoked against petitioner by defendants resulted from his various infractions of prison rules and not out of retaliation for or in response to any legitimate religious activities. Even if under any conceivable theory the so-called "Church of the New Song" is in fact a religion, such restraints and disciplinary measures imposed by the institution were of reasonable and necessary nature under the circumstances.

2. The "Church of the New Song" is not a religion within the scope of the First Amendment.

3. Not being a religion within the scope of the First Amendment,

"Church of the New Song" is not entitled to First Amendment protection claimed by the petitioner.

4. Having fully again "ventilated" the alleged religious claims of petitioner, the relief sought by him is in all respects DENIED.

SIGNED AND ENTERED THIS 10th day of February, 1978.

/s/ John H. Wood, Jr.
JOHN H. WOOD, JR.
UNITED STATES DISTRICT JUDGE



SUPREME COURT OF THE UNITED STATES

No. A-439

HARRY W. THERIAULT,

Petitioner,

v.

FREDERICK SILBER, DIRECTOR, UNITED STATES CHAPLAIN SERVICE, ET AL.

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ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

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Upon Consideration of the application of petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 13, 1979.

/s/ Lewis F. Powell, Jr.
Associate Justice of the
Supreme Court of the
United States

Dated this 13th day of November, 1978.

Dr. Harry W. THERIAULT, Bishop, Church of the New Song of Universal Life, and Rector, The Fountainhead Seminary, Rev. Jerry M. Dorrough, Vice-Rector, The Fountainhead Seminary, and Minister, Church of the New Song of Universal Life, et al.

v.

Norman A. CARLSON, Director, Bureau of Prisons; Rev. Frederick Silber, Director of Chaplaincy Services, Bureau of Prisons; J. D. Henderson, Warden, United States Penitentiary, Atlanta, Georgia; Rev. Jack A. Hanberry, Protestant Chaplain, United States Department of Justice, Bureau of Prisons, United States Penitentiary, Atlanta; Fr. Raymond A. Beane, O.M.F., Catholic Priest, United States Department of Justice, Bureau of Prisons, United States Penitentiary, Atlanta.

Civ. A. No. 13872

United States District Court
N.D. Georgia,
Atlanta Division,
Feb. 25, 1972

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Harry W. Theriault, pro se (Glenn Zell, Atlanta, Ga. of counsel), for plaintiffs,

John W. Stokes, Jr., U.S. Atty., P. Bruce Kirwan, Asst. U. S. Atty., Atlanta, Ga., for defendants.



OPINION AND ORDER OPINION

EDENFIELD, District Judge.

Harry William Theriault, self-styled Bishop of Tellus[1] and self-proclaimed leader of a group designated by petitioners as the Church of the New Song,[2] is also a federal prisoner incarcerated presently in the Atlanta federal penitentiary on "holdover" status from the Marion (Illinois) federal penitentiary. For a year and a half he has sought to compel prison officials in Atlanta and Marion to grant him the right to hold religious services in prison for those who shared his belief in the Eclatarian faith,[3] a faith of which he is the supreme exponent. The prison authorities denied his requests and his appeals to respondent Silber, Director of Chaplaincy Services for the Bureau of Prisons, and respondent Carlson, Director of the Bureau of Prisons, were unsuccessful. Petitioners then filed this class action here and the court, predicating its jurisdiction upon 28 U.S.C. § 1361 (1970), held four full days of hearings on the matter. Walker v. Blackwell, 360 F.2d 66 (5th Cir. 1966). ("Walker I".) The court has concluded that petitioners and the class they represent have been denied First Amendment rights, and it will order relief.

A full recitation of the history of this case is unnecessary. Briefly, Theriault and co-petitioner Dorrough founded the Church of the New Song and the Fountainhead Seminary in 1970 while incarcerated in Atlanta. They nad obtained "doctor of divinity" certificates from a mail-order organization and, as a "game", they decided to challenge the chaplaincy program in the

federal prisons and, at the same time, to develop a new religion of their own. The petition filed in this court alleged that the Government had established religion in the Atlanta penitentiary and was also prohibiting its free exercise by those prisoners who belonged to the Church of the New Song. Petitioners claimed that a "pall of establishment orthodoxy" had been cast over their lives because respondents Hanberry and Beane, the Protestant and Catholic chaplains, respectively, who were members of the prison staff and federal employees, regularly submitted reports on the religious activities of the prisoners which had a direct bearing on the grant or denial of parole. They also contended that the chaplains were promoting the majority faiths at the expense of minority faiths by failing to grant religious standing to the Church of the New Song. The petition was supported by the signatures of 165 prisoners.

Immediately after the petition was allowed filed in this court, Theriault was transferred to Marion which houses the most severe security risks in the federal system. Theriault now began to take his own religious claims seriously and attempted to explain them to the prisoners and staff at Marion. The Chief of Classification and Parole at Marion testified in this court that, at this point, Theriault's activities were truly religious in nature. Theriault approached the Protestant chaplain at Marion for permission to hold religious services for himself and his followers, but the request was denied because the chaplain felt the Church of the New Song was not "recognized." Theriault attempted to meet this objection by assuring the chaplain he would obtain an official charter



from the Universal Life Church, Inc., the mail-order organization which supplied Theriault with his "doctor of divinity" degree. The chaplain brought the matter to the attention of respondent Silber[4] and Rev. Silber testified in court that he upheld the decision of the Marion chaplain because the Church of the New Song and the Eclatarian faith were not "recognized." Theriault also wrote to respondent Carlson but received only a form response directing him to the institutional staff.

As Theriault continued his activities among the Marion prisoners, the staff began to suspect that he was actually organizing a radical political movement. One staff member filed a memorandum on the subject and urged that something be done to control Theriault's activities.[5] Three days after the memorandum was filed, Theriault was placed in punitive segregation ("H-Unit") for failing to obey the order of a security officer to move. He was subsequently released and later cited for a minor violation and for threatening a security officer. On April 1, 1971 Theriault approached Mr. J. Culley, a correctional supervisor, and demanded a place to hold religious services. Culley discussed the matter with Theriault but refused to accede to his demand. Then, "as a preventive measure," Culley had Theriault placed in punitive segregation ("H-Unit").[6] Theriault remained in H-Unit from that night until he was transferred to Atlanta for the hearings before this court.[7] The day Theriault was received back in Atlanta he was immediately placed in the segregation unit and he is still there today.[8] The court finds as fact that the sole basis for the punitive segregation of Theriault was his demand to hold religious services.

A. The "Establishment" Claim

The "establishment" claim raised by petitioners is, for the most part, without merit. The Bureau of Prisons is statutorily charged with the responsibility of providing for the care, subsistence, protection, instruction and discipline of federal prisoners. 18 U.S.C. § 4042 (1970). The Bureau has carried out this responsibility by creating programs to meet the needs of the inmates - be they physical, mental, or spiritual needs. In order to effectuate these programs the Bureau, of course, must hire professional staff - doctors, social workers, teachers, and clergymen. The Bureau cannot maintain a full compliment of medical, educational, or religious professionals on the prison staffs, and a representative selection must necessarily suffice. The ordained clergymen on the federal payroll who serve as chaplains in the federal prison system are hired to provide for the spiritual needs of all prisoners, whatever their religious denomination, and they are not merely the emissaries of their respective churches. As Mr. Justice Brennan has written:

"There are certain practices, conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties also protected by the First Amendment. Provisions for churches and chaplains at military establishments for those in the armed services may afford one such example. The like provision by state and federal governments for chaplains in penal institutions may afford another example. It is argued that such provisions may be assumed to contravene the Establishment



Clause, yet be sustained on constitutional grounds as necessary to secure to the members of the Armed Forces and prisoners those rights of worship guaranteed under the Free Exercise Clause. Since government has deprived such persons of the opportunity to practice their faith at places of their choice, the argument runs, government may, in order to avoid infringing the free exercise guarantees, provide substitutes where it requires such persons to be . . .

"Such activities and practices seem distinguishable from the sponsorship of daily Bible reading and prayer recital. For one thing, there is no element of coercion present in the appointment of military or prison chaplains; the soldier or convict who declines the opportunities for worship would not ordinarily subject himself to the suspicion or obloquy of his peers. Of special significance to this distinction is the fact that we are here usually dealing with adults, not with impressionable children as in the public schools. Moreover, the school exercises are not designed to provide the pupils with general opportunities for worship denied them by the legal obligation to attend school. The student's compelled presence in school for five days a week in no way renders the regular religious facilities of the community less accessible to him than they are to others. The situation of the school child is therefore plainly unlike that of the isolated soldier of the prisoner.

"The State must be steadfastly neutral in all matters of faith and neither favor nor inhibit religion. In my view, government cannot sponsor religious exercises in the

public schools without jeopardizing that neutrality. On the other hand, hostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion, the withholding of draft exemptions for ministers and conscientious objectors, or the denial of the termporary use of an empty public building to a congregation whose place of worship has been destroyed by fire or flood.
. . ." Abington School District v. Schempp, 374 U.S. 203, 296-299, 83 S. Ct. 1560, 1610, 10 L.Ed. 2d 844 (1963) (concurring opinion).

The court concludes that the maintenance by the Bureau of Prisons of chaplains at the Atlanta federal penitentiary is not unconstitutional. See Horn v. People of California, 321 F. Supp. 961 (E.D. Cal. 1968).

Notwithstanding this conclusion, the court does find merit in petitioners' claims about the filing of religious reports by respondents Hanberry and Beane. The testimony before this court established that Rev. Hanberry and Fr. Beane regularly submit reports to the caseworkers at the Atlanta penitentiary in which they comment on the inmates' participation or lack of participation in their respective religious activities. These reports, together with reports from other staff members, are culled by the caseworkers and form part of the inmates' profiles which are presented to the Board of Parole when the inmates are being considered for release on parole. It is not inconceivable that the grant



or denial of parole is based to some degree on the religious reports submitted by the chaplains.

In the court's view, the submission of religious reports by respondents Hanberry and Beane involves the Government in a violation of the neutrality it must maintain with respect to religion. There can be no doubt that an inmate whose file contains a positive religious report stands a better chance of being released on parole than an inmate with a neutral or negative religious report. Indeed, it is likely that the inmates' very knowledge of the existence of these religious reports may compel some to participate in religious activities. The Government, by allowing these religious reports to be submitted, is in effect promoting religion among inmates and indirectly punishing the atheist, agnostic, or Eclatarian who declines to participate in these religious programs. This is unconstitutional. As the Supreme Court has declared:

"Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." Epperson v. Arkansas, 393 U.S. 97, 103-104, 89 S.Ct., 266, 270, 21 L.Ed. 2d 228 (1968).

The court will accordingly enjoin the submission of these religious reports by respondents Hanberry and Beane.

B. The "Free-Exercise" Claim

The chaplains at Atlanta and Marion, as well as Rev. Silber, denied Theriault's requests to hold religious services because they felt the Church of the New Song and the Eclatarian faith were not "recognized." The insistence by these federal employees that Theriault and his followers meet this "recognition" standard before they might freely exercise their religious beliefs runs squarely afoul of the First Amendment.[9] One of the purposes of the First Amendment was to prohibit the imposition by government of any standard as a prerequisite to the free exercise of religion. As the Supreme Court has noted:

"By the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and States. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services. They knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval from each King, Queen, or Protector that came to temporary power." Engel v. Vitale, 370 U.S., 421, 429, 82, S. Ct. 1261, 1266, 8, L. Ed. 2d, 601 (1962).

But respondents go further. They argue that Theriault's "religion" is not a religion at all but merely a random amalgamation of pseudo-political notions; that his "church" is nothing but a collection of some of the worst prisoners in the federal system. Similar arguments were offered by prison officials when so-called Black Muslim prisoners began suing in federal court for religious freedom. One of the first courts to deal with these arguments responded as follows:

"Under freedom of religion in the country a person has an absolute right to embrace the religious belief of his choice. The Constitution does not define 'religion' and reference to standard sources of the meaning of words indicates that there is not complete agreement on even a definition of the term. Nor is it the function of the court to consider the merits or fallacies of a religion or to praise or condemn it, however excellent or fanatical or preposterous it may be. Whether one is right about his religion is not a subject of knowledge but only a matter of opinion.

"It is sufficient here to say that one concept of religion calls for a belief in the existence of a supreme being controlling the destiny of man. That concept of religion is met by the Muslims in that they believe in Allah, as a supreme being and as the one true god. It follows, therefore, that the Muslim faith is a religion." Fulwood v. Clemmer, 206 F. Supp. 370, 373 (D.D.C. 1962).

The record in this case amply reflects the tenets, such as they are, of the Church of the New Song and the Eclatarian faith. The Eclatarian faithful worship a devine and universal spirit which they identify as "Eclat" and which they believe manifests itself in all animate and inanimate objects. Since each person is thought to possess some of this universal spirit, the Eclatarians believe that loneliness may be overcome and true brotherhood achieved if people became

more conscious of Eclat. Petitioners have their own Eclatarian Bible, their own Eclatarian newsletter ("The Leaves"), their own religious paraphernalia. A number of inmates testified before this court that Theriault and his teachings have had a positive, rehabilitative effect upon their lives and have inspired them religiously. This court is not unmindful of the very real possibility that petitioners are still engaging in a "game" and attempting to perpetrate a colossal fraud upon both this court and the federal prison system. Nevertheless, with all due respect to respondents, the court cannot declare petitioners' religion illegitimate.

Respondents contend, however, that even if the Eclatarian faith is not illegitimate, they need not permit its free exercise in prison because Theriault and his followers are violent and threaten the security of the prison. Certainly if respondents could show that a compelling and substantial public interest required the subjugation of petitioners' First Amendment rights, they would prevail. Walker v. Blackwell, 411 F. 2d 23 (5th Cir 1969) ("Walker II").[10] But the burden upon respondents is heavy, and a cursory review of the Black Muslim cases reveals how very heavy that burden is.

In Cooper v. Pate, 324 F.2d 165 (7th Cir. 1963), a state prisoner had filed a civil rights claim alleging that he was confined in punitive segregation and deprived of religious rights because he was a Black Muslim, and the district court had dismissed the prisoner's petition. On appeal the Attorney General of the State of Illinois asked the Seventh Circuit to take judicial notice of certain social



studies purporting to show that, "despite its pretext of a religious facade," the Black Muslim Movement was an organization dedicated to the overthrow of the white race and to the incitement of riots and violence inside prison walls. The Attorney General also asked the court to take judicial notice of an official police study which documented numerous acts of violence committed by members of the Black Muslim Movement in a variety of state and federal prisons, including the Atlanta federal penitentiary. The Seventh Circuit agreed to take judicial notice of these studies and affirmed the lower court's dismissal of the petition. The Supreme Court reversed and held that the petition stated a valid cause of action. Cooper v. Pate, 378 U.S. 546, 84, S. Ct. 1733, 12 L.Ed.2d 1030 (1964). On remand, the district court enjoined prison officials from denying the petitioner and other Black Muslim prisoners the right to communicate with and visit ministers of their faith and the right to attend religious services conducted by them. The Seventh Circuit affirmed. Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967).

Similarly, in Long v. Parker, 384 U.S. 32, 86 S.Ct. 1285, 16 L.Ed.2d 333(1966), the Supreme Court vacated the judgment of a district court, which had been affirmed by the Third Circuit, dismissing the petition of a Black Muslim prisoner at the federal penitentiary in Lewisburg, Pennsylvania, who complained of the deprivation of religious rights. On remand, the district court denied relief and relied on its decision in Desmond v. Blackwell, 235 F. Supp. 246 (M.D. Pa. 1964). In Desmond the district court found that Black Muslim meetings were devoted to the doctrine of hate, that those attending

such meetings referred to staff as "monsters of inferior intelligence," "devils", and "skunks," that the supervision of such meetings caused a depletion in the staff force and made it less available for other duties, that militarily-trained prisoners known as the Fruit of the Islam stood guard at the entrance to the meetings, that some Black Muslims assaulted and stabbed another prisoner in order to induce him to join their faith, and that when disciplinary action had to be taken against one member of the group the entire membership approached the control center of the institution and demanded his release from administrative segregation. On appeal, however, the Third Circuit vacated the judgment of the district court and remanded the case for further proceedings. Long v. Parker, 390 F.2d 816 (3d Cir. 1968). The court found that the district court's reliance on Desmond was misplaced and that:

"Mere antipathy caused by statements derogatory of, and offensive to the white race is not sufficient to justify the suppression of religious literature even in prison. Nor does the mere speculation that such statements may ignite racial or religious riots in a penal institution warrant their prescription." At 822.

No one has testified that the Church of the New Song preaches hate. There was evidence, that Theriault kicked a prison official, destroyed government property, threatened security officers,(11) and sent vile letters to a federal district judge in Illinois.(12) However, in view of the Black Muslim cases, this court cannot say on the basis of this evidence that Theriault or his group are so menacing that they should not be allowed to freely exercise their religion.



The court finds that respondents have failed to show a sufficiently compelling public interest requiring the subjugation of petitioners' First Amendment rights.(13) Walker II, supra. Accordingly, it must grant petitioners appropriate relief so they may freely exercise their rights within the context of a prison community.

1. Religious activities

This court interprets the First Amendment as guaranteeing the right of federal prisoners who share a common religion to gather for devotional meetings and to study the teachings of that religion. This right cannot be denied the members of the Church of the New Song. Since respondent Carlson has already promulgated a detailed policy statement - Bureau of Prisons Policy Statement 7300.43A - concerning the religious rights of federal prisoners, the court need only order him to direct prison authorities to apply that policy to petitioners.

Policy Statement 7300.43A authorizes the scheduling of worship services, religious nature "with reasonable frequency" for all committed offenders under supervisory procedures established by the warden. It also directs the prison chaplains to allocate a proportionate share of the funds they receive to meet the religious needs of interested faith groups. Thus, for example, the Black Muslims at the Atlanta penitentiary are given meeting space and permitted to meet twice weekly. Respondent Beane, who serves as their advisor in religious matters, reproduces

religious material for the Muslims on institutional equipment, permits them the use of a tape recorder, and coordinates the purchase of various religious books from the funds of the institution. Bethea v. Daggett, 329 F. Supp. 796 (N.D. Ga. 1970) aff'd 444 F. 2d 112 (5th Cir. 1971).This is not to say, of course, that respondents must pay for all the printing petitioners seek or that the members of the Church of the New Song may collect "tithes" to fund their own activities. As in other areas, prison officials should wisely use their discretion in the handling of these matters.

Since there are no ministers of the Eclatarian faith outside prison walls, prison authorities may not disqualify Theriault from leading religious services for his Church. See Bethea v. Daggett, supra. This does not mean Theriault is to be treated as a privileged person; he has no more "right" to a beard than any other inmate. Brooks v. Wainwright, 428 F.2d 652 (5th Cir. 1970); Brown v. Wainwright, 419 F. 2d 1376 (5th Cir. 1970). And while Theriault may preach the doctrines of his faith - including the "Eclatarian Demandate of Natural Rights" - at his religious gatherings, any proclamations by him urging violence, riots, or insurrection, may be suppressed by prison authorities and may afford the authorities with a sufficient reason to discontinue the activities of the Church of the New Song. Knuckles v. Prasse, 302 F. Supp. 1036 (E.D. Pa. 1969), aff'd, 435 F. 2d 1255 (3rd Cir. 1970), cert. denied, 403 U.S. 936, 91 S. Ct. 2262, 29 L. Ed. 2d 717 (1971).



2. Religious Correspondence

The Fifth Circuit has held that Black Muslims and other federal prisoners may correspond with their religious leaders for spiritual guidance and advice. Walker II, supra. It follows that members of the Church of the New Song may correspond with their religious leader - Theriault - for spiritual guidance and spiritual advice.

Of course, prison authorities may ascertain the contents of such correspondence to make certain that what is sought is spiritual guidance and spiritual advice. However, they may not simply characterize all correspondence of the members of the Church of the New Song as "nonreligious" because of their subjective evaluations of the Eclatarian faith.

Theriault has no "right" to correspond with famous personalities to solicit funds for his Church. Such correspondence falls outside the scope of First Amendment protection and may be controlled by prison officials in the customary manner. Shack v. Wainwright, 391 F.2d 608 (5th Cir.), cert. denied, 392 U. S. 915, 88 S. Ct. 2078, 20 L. Ed. 2d 1374 (1968).

3. Punishment for Religious Activities

This court has found as fact that Theriault was placed in punitive segregation at Marion on April 1, 1971 solely to prevent him from holding religious services for himself and his followers. He remained in punitive segre-

gation thereafter and upon his transfer to Atlanta for the hearings before this court he was summarily placed in punitive segregation where he is today.

Since the Marion authorities unconstitutionally denied Theriault his First Amendment rights and confined him in punitive segregation solely because he sought to exercise those rights, his present confinement in punitive segregation is unlawful and he must be restored to the general prison population. Cooper vs. Pate, 382 F. 2d 518 (7th Cir. 1967), Howard v. Smyth, 365 F. 2d 428 (4th Cir. 1966), cert. denied 385 U.S. 988, 87 S. Ct. 599, 17 L. Ed. 2d 449 (1966).(14) The court reiterates that authorities may take whatever disciplinary measures are necessary - including the imposition of punitive segregation, - if Theriault or his group begin to preach insurrection or violence, or if they violate institutional rules and regulations requiring punishment subsequent to the date of the opinion and order.

4. Other Matters

Petitioners have raised four other issues which the court finds are unrelated to the central claim. They pray for.

(1) The right to give legal advice to all members of their faith:

(2) The right, at disciplinary hearings, to:

(a) a written copy of the charge,
(b) a hearing before an impartial official,



c. cross-examine accusers, call witnesses, and have legal counsel or counsel substitute, and
d. written decisions with specific findings and supporting decisions;

3. The right to subscribe to and receive an Atlanta weekly publication called "The Great Speckled Bird", and
4. The right to freely communicate with the press and the publishing media.

There has been no showing that respondents have prevented inmates - whether they be members of the Church of the New Song or not-from furnishing legal assistance to other inmates in contravention of Johnson v. Avery, 393 U. S. 483, 89 S. Ct. 747, 21 L. Ed 2d 718 (1969), and Wainwright v. Coonts, 409 F. 2d 1337 (5th Cir. 1969). Of course, prison officials may regulate the legal activities of inmates and petitioners have not shown that respondents have arbitrarily or capriciously regulated their legal activities. See Arey v. Peyton, 378 F. 2d 930 (4th Cir. 1967).

This court is aware that some recent decisions dealing with state prisons have granted the procedural due process rights sought by petitioners, E.g. Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971). Nevertheless, the court finds itself in agreement with the observation of the Second Circuit that the federal prisons already afford inmates due process in disciplinary hearings (see Bureau of Prisons Policy Statements 7400.6A) and that those procedural rights which are not afforded

are not constitutionally mandated. See Sostre v. McGinnis, 442 F. 2d 178 (2d Cir. 1971), petition for cert. filed, 40 U.S.L.W. 3170 (U. S. Aug. 18, 1971) No. 71-246).

No evidence was adduced at the hearings that petitioners ever requested "The Great Speckled Bird" or that such requests, if made, were denied. Petitioners do not contend that this publication is a religious newsletter of the Church of the New Song and no "free exercise" issue is involved. Cf. Jackson v. Godwin, 400 F. 2d 529 (5th Cir. 1968). Prison officials may make reasonable regulations as to the circulation of magazines and newspapers and this court will not interfere with such administrative matters. Royal v. Clark, 447 F. 2d 501 (5th Cir. 1971).

Finally, the court notes that Bureau of Prisons Policy Statement 1220.1A (February 11, 1972) now permits federal prisoners full access to the news media through the Prisoners Mail Box. The court also notes that under Bureau of Prisons Policy Statement 7300.46 federal prisoners may submit manuscripts for publication so long as they do not deal with the details of the author's life, other inmates, criminal careers, and matters currently in litigation, and so long as they do not jeopardize the security and discipline of federal prisons. The court does not find the limitations in Policy Statement 7300.46 unconstitutional and will not interfere with it. Royal v. Clark, supra.



ORDER

For the foregoing reasons petitioners' petition for injunctive and other relief is granted in part and denied in part. It is granted in part as follows:

(1) Respondents Hanberry and Beane are enjoined from preparing or submitting oral or written reports to other staff members of the Atlanta federal penitentiary concerning the religious activities of individual inmates at that penitentiary;

(2) Respondent Carlson and respondent Silber are ordered to direct prison authorities under their jurisdiction to grant petitioners the right to freely exercise their religion, including the right to correspond with petitioner Theriault for the purpose of seeking spiritual guidance, as regulated by Bureau of Prisons Policy Statement 7300.43A and in accordance with the opinion of this court;

(3) Respondent Henderson is hereby ordered to immediately release petitioner Theriault from confinement in punitive segregation and restore him to the general prison population; and

(4) Respondent Carlson is hereby ordered to instruct prison authorities under his jurisdiction that they may not re-impose confinement in punitive segregation upon petitioner Theriault unless Theriault violates an institutional rule or regulation requiring such confinement subsequent to the date of this opinion and order or incites riot or insurrection during the conduct of his religious activities subsequent to the date of this opinion and order.

In all other respects it is denied.

It is so ordered.

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FOOTNOTES

1. Theriault testified that he derives his authority to be "Bishop of Tellus" (Bishop of the Earth) from the Book of Revelations of the New Testament. Chapter 3, Verse 3 of the Book of Revelations states:

"Remember, then what you received and heard; keep that, and repent. If you will not awake, I will come like a thief, and you will not know at what hour I will come upon you." (Emphasis added.) Theriault, who is incarcerated for robbery, claims that he is that "thief".

2. Theriault testified that the name of the Church is derived from the "new song" that the younger generation is now singing as well as from the "new song" of the new era described in the Book of Revelations, 5:9 and 14:3 (" . . . and they sang a new song").

3. According to Theriault, Eclat is the "new name" of the divinity referred to in the Book of Revelations 3:12. The Eclatarian faithful, aside from one secretary, are to be found only in the federal penitentiaries of Atlanta and Marion.

4. The text of the chaplain's letter to Rev. Silber is as follows:
"FREDERICK SILBER, 25 Sept 70
DIRECTOR OF CH. SERV.
BUREAU OF PRISONS,
WASHINGTON, D. C.

WILLIAM G. EZELL,
PROTESTANT CHAPLAIN
U. S. PENITENTIARY,
MARION, ILLINOIS
RECOGNITION OF CHURCH
GROUPS

As you know, Harry Theriault, #90987, was transferred to Marion from the Atlanta penitentiary. He represents himself as a Bishop in the Church of the New Song.

His initial moves to have use of the chapel, distribute literature and hold study classes have been denied. The reason for such denial is that he is not recognized as a church. He now comes with a letter addressed to a Universal Life Church in Modesto, California requesting a church charter, etc. It is reported that he has this kind of charter for the church he had in the penitentiary in Atlanta. There are no doubt 'diploma mills', etc. who for fees or favors would send him the necessary papers and documents. We will have a check by a probation officer in this area made on this particular man and church.

When Theriault is denied one place, he goes another. He has some of our staff involved now in his requests for recognition. There is little question that if we deny his efforts to secure documents that there will be writs, etc. Therefore, if you have previous experience in similar cases or could advise us, it would be appreciated. Also, we want to advise you of this case so you would not be unaware.



The move with him has been made with diplomacy and while it is not an emergency, it could develop. Any help in this matter would be appreciated.

WGE: kw"

5. The text of the memorandum is as follows:

"SUBJECT: Theriaults [sic] activities and organization of inmates. (90987-131)

During the past quarter in "F' unit, I have observed Theriaults [sic] activities, both in and out of the unit. Following is a listing of incidents and observations that has led me to believe he has formulated a strong, radical power structure in this institution and others.

Also, it would not be hard to believe, he may have some followers on the outside.

Theriault has organized a group called "The New Church of World Song' or some thing similar to this. He is the leader and members address him as the Bishop. Others have been ordained as ministers by him. I have no idea, as to how large this organization might be. Some investigation would reveal this.

Kessler 1707-135, E-B-10, attempted to assist Theriault in his duties as F orderly, a few weeks ago. Both were warned and Kessler sent out of the unit. This time I was informed Kessler was one of his ministers and as such should be allowed to assist him.

Theriault was greatly upset, when Gomez F-C 18, was taken to F Unit the

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first time and became very inquisitive after informing me this was another of his ministers and seemed to convey to me that he should be given this information because he was Gomez Bishop.

He has constantly kept occupied, writing writs and other legal papers for the inmate population. This seems to be a very big business, that occupies most of his time.

Arnold from I unit recently made an attempt to assist in the orderly work and again both were warned. Minshew F-A-9 has assisted Theriault on a few occasions, before being assigned to the Food Service detail.

Mr. Temper returned some papers to him recently, advising him they could not be sent out. He immediately asked me to call Mr. Keohane. I compiled and was advised that Mr. Edmonds was in charge that day. Mr. Edmonds would not give Theriault permission to send the papers out. Theriault became very upset and proceeded to say this was a conspiracy to prevent him from mailing this material. He proceeded to use several colorful adjectives to describe Mr. Edmond to Welty F-A-8. I advised him to be careful in using these terms in relation to staff members. His comment was "Freedom of speech, man.' During the discussion, Welty advised him, the matter should be taken to the Warden and not mess with these people.

Theriault became quite frustrated after not being allowed to visit Alderislo 85719-132 in the hospital (12-10-70).



He seemed to think regulations does not apply to him as one perrtting his position.

I was told he held a meeting in the V.T. building (12/11/70), with several members of his group. This can be verified by the Supervisor of the evening watch and the V.T. officer. He left the unit 12/12/70 with a Bible. I believe he conducted a meeting somewhere on this date. This would need some checking. Gomez attempted to attend Mr. Sumners [sic] group on this date but suddenly changed his mind. He seemed to have some purpose in checking the group.

I have observed Cappola 1642-135, Heard, Kolburg 27388-138 and several other inmates, either contacting or being contacted by Theriault.

Considering these incidents and other information gathered during these past days, I feel Theriault has shown great disregard for the institutional authority and regulations and has went about setting up this organization, with him as the central power figure, utilizing the talents of several key figures as ministers. This group has members of all races and has the characteristics of an extremist group on the far left, completely against the system (whatever it may consist of) and will let nothing stop or stand in its way.

It is my opinion, that if something is not done to control the activities of Theriault, we will have an incident in the near future causing damage to the institution proper or injuries

to personnel to compel agreement to the groups [sic] demands."

6. The text ot the report prepared by Culley on the incident is as follows:

"At approximately 5:30 p m [sic] this evening Theriault approached Mr. J. White C/S and myself in the east corridor and demanded a place to hold a religious service. I explained to him that to hold a meeting of a religious nature he would have to obtain approval of the Administration by working through the Chaplain. He would not accept this as an answer to his question or demand. At this time he appeared to be getting emotional, so I asked him to step into the office and we would discuss the matter.

"To take away the opportunity of Theriault creating an incident, if he so desired, I kept him in the office until the evening yard was closed and we had began[sic] to count.

"During our talk in the office, Theriault still demanded to be permitted to worship his lord in a place where other inmates could come if they so desired.

"He stated he would hold his services and if I attempted to break it up, I would have to resort to violence because no one would leave if I instructed them to leave. As Theriault left the office for count [sic] he commented, I will do what I feel I have to.



"as a preventive [sic] measure toward any type of incident taking place as he indicated, I placed him in H-Unit immediately after count before the general population was released for evening activities.

"Theriault offered no resistance during the move. He asked if this was my decision or had I called someone. I told him it was mine. He then stated, "Can't we come to an understanding, I didn't say I was going to do it tonight.' He further stated that he would do as I instructed.

"In H-Unit [sic] Theriault refused to remove his clothing for a shakedown. It was very clear that he wanted the staff to man-handle him. His pockets were emptied, belt removed and he was given a very thorough frisk shakedown. To assure the chance of contraband not being introduced into the unit, Theriault was placed in a closed front cell. NOTE: At approximately 9:00 p m [sic] I visited with Theriault in H-Unit. I asked if he was willing to submit to a strip shakedown. He stated, "I am not playing your silly games and if you try something there will be violence.' I advised him again why he was in the closed front cell and if he submitted to the shake-down [sic] I would move him to the front at this time. He would not have anything to do with the request.

/s/JC"

7. That night Theriault destroyed part of his H-Unit cell and the next day both kicked and threatened a security officer.

8. On October 28, 1971, prior to Theriault's transfer to Atlanta, the Special Intelligence Supervisor at the Atlanta penitentiary circulated a memorandum advising all staff that Theriault was to be placed in segregation upon his reception at Atlanta and was not to be removed from segregation without the approval of the Associate Warden - Controls. When Theriault was received back to Atlanta on November 6, 1971, he was placed in the Segregation Unit in accordance with the October 28th memorandum.

9. It appears also to run afoul of Policy Statement 7300.43A of the Bureau of Prisons which was issued by respondent Carlson. That Statement commits the Bureau to extending the greatest amount of religious freedom possible within a prison context to committed offenders, and assisting them in the practice of "the religion of their choice." Nowhere in the Statement is there an indication that only "recognized" religions can be practiced.

10. This same standard has been applied in cases dealing with state institutions. E. g. Brown v. Peyton, 437 F. 2d 1228 (4th Cir. 1971). In Long v. Parker, 390 F. 2d 816 (3rd Cir. 1968), and Banks v. Havener, 234 F. Supp. 27 (E. D. Va. 1964),



however, a "clear and present danger" test was enunciated. In a thoughtful note, Judge Higginbotham has suggested that the "clear and present danger" test might be inapplicable in the context of a prison community and that a less rigorous "clear and probable danger" test might be more appropriate so that prison officials need not suffer a catastrophic riot in order to create a factual record sufficient to justify the imposition of restraints. Knuckles v. Prasse, 302 F. Supp. 1036, 1048-49 (E.D. Pa. 1969). aff'd 435 F. 2d 1255 (3d Cir. 1970), cert. denied 403 U.S. 936. 91 S. Ct. 2262, 29 L.Ed 2d 717 (1971).

Judge Higginbotham's observations have much appeal. However, in the instant case, this court concludes that respondents have not even shown a clear and probable danger emanating from Theriault or the Church of the New Song.

11. Prison officials from Marion testified that Theriault's threats caused them to fear he and his group might engage in violent and disruptive actions, and they characterized Theriault as a serious security risk. However,in response to questions from the bench, these officials admitted they would characterize all the inmates of Marion as serious security risks, and the regular worship services are held at Marion for these inmates.

12. It is a federal offense to send any mail which threatens to injure the person of the addressee. 18 U.S.C. §876 (1970). A person who commits this offense is liable to a $10,000 fine or up to five years in prison. The vile letters which Theriault sent to the judge were brought to the attention of the warden at Marion and respondent Carlson. Nevertheless, the letters were apparently not deemed sufficiently threatening to warrant criminal prosecution.

13. The issues involved in this case might also be cast in an "equal protection" setting. Although the instant case involves a federal penal institution and the actions of federal employees so that the Equal Protection Clause of the Fourteenth Amendment is inapplicable, the Supreme Court has read "equal protection" notions into the Due Process Clause of the Fifth Amendment (which does apply to the federal government) and has held that federal action may be so discriminatory as to be violative of due process. Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322, 22 L.Ed. 2d 600 (1969); Schneider v. Rusk, 377 U.S. 163, 84 S. Ct. 1187, 12 L.Ed. 2d 218 (1964); Bolling v. Sharpe, 347 U.S. 497, 74 S. Ct. 693, 98 L.Ed. 884 (1954).

Nevertheless, since this court



finds ample room within the Free Exercise Clause to cover the issue in this case (see Brown v. Peyton, supra) and since the Supreme Court itself has warned that the "equal protection" and "due process" concepts may not be always interchangeable (Bolling v. Sharpe, supra at 499, 74 S. Ct. 693), the court will rest its conclusions on the First Amendment.

14. There is no basis in the record to support Theriault's claim that he was transferred to Marion in 1970 solely because he filed his petition in this court. Had there been such a basis, the court might have branded the transfer an abuse of administrative discretion. Cf., Lawrence v. Willingham, 373 F.2d 731 (10th Cir. 1967).